5-19-2014

North Idaho Bldg. Contractors Ass'n v. City of Hayden Respondent's Brief Dckt. 41316

Docket No. 41316-2013

In the Supreme Court of the State of Idaho

NORTH IDAHO BUILDING CONTRACTORS ASSOCIATION, an Idaho non-profit corporation; TERMAC CONSTRUCTION, INC., an Idaho corporation, on behalf of itself and all others similarly situated,

Plaintiffs-Appellants-Cross Respondents

and

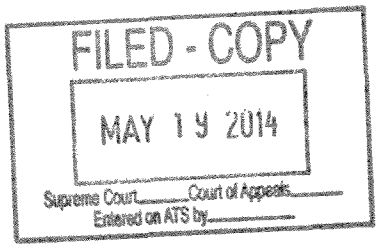
JOHN DOES 1-50, whose true names are unknown,

Plaintiffs,

v.

CITY OF HAYDEN, an Idaho municipality,

Defendant-Respondent-Cross Appellant.



RESPONSE BRIEF OF RESPONDENT and OPENING BRIEF OF CROSS-APPELLANT

Appeal from the District Court of the First Judicial District of
The State of Idaho, in and for the County of Kootenai,
Honorable Benjamin R. Simpson, Presiding

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STATEMENT OF THE CASE

This is the response brief of Defendant-Respondent-Cross Appellant City of Hayden ("Hayden" or "City"). It responds to the *North Idaho Building Contractors Association's Appellant Brief* ("*Appellants' Brief*") of Plaintiffs-Appellants-Cross Respondents North Idaho Building Contractors Association, et al. ("Builders"). This brief also serves as Hayden's opening brief on cross appeal.

I. NATURE OF THE CASE

This is the latest and, if the District Court is affirmed, should be the last in a series of cases to reach this Court in which developers trained their sights on development fees after the housing market went from huckledebuck to the doldrums. Unlike the others, this one goes straight to the merits.

For many years, Hayden has engaged in a program to ensure that, as Hayden grows, sewer capacity continues to be available to serve new residents and businesses. Pursuant to City Code § 8-1-5 (R. Vol. 1, pp. 136-37), Hayden charges a one-time sewer capitalization fee ("cap fee") at the time of building permit issuance.[1] The cap fees are accounted for in a segregated account and are used only for capacity expansion. Hayden also charges a bi-monthly fee that covers operation and maintenance of the system. That fee has not been challenged. See *Chatwin Affidavit #1* (R. Vol. 1, pp. 108-90) for a detailed explanation of the City's fees and how they relate to the Hayden Area Regional Sewer Board ("HARSB") (pronounced "harbs").

The cap fees are used by Hayden to fund capital improvements necessary to replace the system capacity consumed by newly permitted structures. The cap fee is based on the cost of replacing the units of capacity required for new hook-ups. This is a simple concept. Hayden

[1] Fees of this type go by various other names including connection fees, hook-on fees, tap fees, or the like.

totals the cost of all planned sewer infrastructure projects that expand capacity, and then divides by the number of future users that will be served by that added capacity. If a particular project provides both capacity expansion and replacement/upgrade of existing capacity, the project cost is apportioned, and the cap fee is based solely on the expansion portion.

This is a self-perpetuating system which ensures that infrastructure will be available to serve new users as they arrive. If Hayden did not operate in this way, existing excess sewer capacity would quickly be consumed, and Hayden would have to deny new permit applications and/or require developers to provide that infrastructure on their own nickel with attendant delays.

The cap fee keeps costs as low as possible by allowing the system to be expanded at opportune times in appropriately sized increments.[2] Ironically, Builders are challenging the very thing that keeps them in business—the availability of infrastructure for new development. The gravamen of their complaint is that the fees are illegal taxes because they are based on the replacement value of the system capacity and generate revenue to fund future expansion of the sewer system. Because the program facilitates new growth, Builders insist that Hayden's only lawful option is to adopt an ordinance for impact fees pursuant to Idaho Development Impact Fee Act ("IDIFA"), Idaho Code §§ 67-8201 to 67-8216. Hayden contends that IDIFA is not mandatory and cap fees are authorized by four other Idaho statutes.

II. COURSE OF PROCEEDINGS

The District Court granted Hayden's motion for summary judgment on the critical legal

[2] An intriguing example of this is the Government Way project. Government Way is a thoroughfare that was torn up and reconstructed a few years ago. When Builders found that payments for the "Government Way Project" were included among the expenses paid by the cap fees, they assumed, incorrectly, that the expenses were for the road project. They were not. Hayden had the foresight to save money by expanding the capacity of the sewer line at the same time the road was torn up. If there had been no funds available from the cap fee, the sewer project would have had to be undertaken eventually (tearing up the road a second time) with attendant delays and much higher cost. *Phillips Affidavit* at 5 (R. Vol. 3, p. 661). Builders, by the way, could have simply asked about the Government Way project. Instead, they litigated.

issue. It ruled that Hayden's cap fees are lawful user fees authorized by statute and that the money collected may be used to fund new infrastructure to serve future demand as it arrives. The District Court stopped short of granting the motion in full, however, because it concluded that there were unresolved issues concerning Builders' allegation of accounting improprieties.

Recognizing that the central question in the case had been answered, the parties endeavored to resolve the accounting issues by stipulation so Builders' appeal could proceed without delay. The parties agreed that Hayden would present to Builders a detailed statement explaining the status of each of the outstanding accounting issues. That information was provided by way of the *Phillips Affidavit* (R. Vol. 3, pp. 657-68).

The parties then stipulated to all of the facts set out in the *Phillips Affidavit.* In addition, Builders agreed to withdraw with prejudice any claim relating to alleged accounting errors, financial discrepancies, or improper expenditures. Each of the above-recited facts is taken directly from the *Stipulation* at 2-3 (R. Vol. 2, pp. 270-71).

The *Stipulation* paved the way for the District Court to enter its *Order Granting SJ* and *Judgment #1*. Unlike the earlier *Decision on MSJ*, this decision resolved the entire case by dismissing all of Builders' claims with prejudice. Builders timely filed *Builders' Appeal.*[3] Meanwhile, the parties briefed and argued *Hayden's Attorney Fee Memo.*

This Court remanded the matter because *Judgment #1* contained a reference to the *Stipulation* in violation of rules prohibiting the inclusion of procedural matters. The District Court thereafter issued *Judgment #2* and later its *Decision on Fees* denying Hayden's request for

[3] *Builders' Appeal*, by the way, states that NIBCA is appealing the "Order Granting Summary Judgment" dated April 5, 2013. It should have given the date as July 2, 2013. This resulted in Hayden referring incorrectly, in *City's First Appeal* and *City's Amended Appeal,* to the April 5, 2013 order as the basis for Builders' Appeal. This is of no consequence, however. Hayden acknowledges Builders' Appeal was a timely and effective appeal of the July 2, 2013 order despite the improper date reference.

fees. Hayden timely cross-appealed the attorney fee denial.

III. STATEMENT OF THE FACTS

The facts are not in dispute. The gravamen of Builders' lawsuit is that the cap fee is calculated on the basis of replacement cost (rather than original construction cost) and that Hayden uses the money to expand its sewer system to serve future customers. That is, indeed, how the cap fee works. The only question is whether doing so is authorized by statute.

Initially, that appeared to be all the case was about. After Hayden filed its motion for summary judgment, Builders pivoted. Suddenly, it seemed, the case was all about accounting issues. Discovery consumed considerable time and expense—despite the fact that Hayden had opened all its books to Builders' accountant a year before suit was filed and despite Builders' attorney's earlier statement that the accounting appeared to be in order.[4]

Given the extent of discovery that Builders insisted on conducting, it may seem surprising that they simply walked away from accounting issues following the *Phillips Affidavit*. But it is not surprising when one considers what that affidavit proved. It showed that Builders' allegations of accounting issues amounted to little or nothing. Except for one inadvertent $110 error, not a penny of the cap fee money was spent on non-sewer expenses. In fact, on balance, Hayden was undercharging its cap fee account, not overcharging it as Builders alleged.

ADDITIONAL ISSUES PRESENTED ON APPEAL

Builders framed the substantive issue in terms of two statutes. Hayden would frame it more broadly to encompass other statutes. Hayden also seeks attorney fees.

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[4] In a letter of January 27, 2012, Builders' counsel acknowledged the extensive pre-litigation information exchange, which resolved their concerns as to whether cap fees were being spent improperly on maintenance and other non-capital expenses. The letter then focused exclusively on the legal issue of whether the cap fee may be used to fund future expansion. *Meyer Affidavit #2*, Exh. 4 (R. 330-32). See also, Letter to John R. Jameson at 2-3 (Oct. 22, 2012), *Meyer Affidavit #2*, Exh. 11 (R. Vol. II. pp. 354-55).

1. Is the cap fee authorized by any Idaho Statute, including Idaho Code § 63-1311 (user fees), Idaho Code § 50-323 (water systems), Idaho Code § 50-301 (home rule), or Idaho Code § 50-1030 (Idaho Revenue Bond Act)?
2. Should the District Court have granted Hayden's request for attorney fees?
3. Should this Court grant attorney fees to Hayden on appeal?

ATTORNEY FEES ON APPEAL

Hayden seeks reversal of the denial of attorney fees by the District Court. It also seeks attorney fees on this appeal and cross appeal pursuant to Idaho Code §§ 12-117(1) and 12-117(2). The basis of Hayden's claims of attorney fees and opposition to Builders' request for fees is set out in section I.E at page 31 below.

DOCUMENTS IN THE APPELLATE RECORD

For the convenience of the Court and the parties, the following list sets out the names and locations of all documents in the appellate record. They are listed alphabetically by their "short name" used in this brief.

"Amended Complaint" – *Amended Complaint* dated Apr. 11, 2012 and filed Apr. 12, 2012 (R. Vol. 1, pp. 32-50).
"Answer" – *Answer to Amended Complaint* dated and filed June 27, 2012 (R. Vol. 1, pp. 51-67).
"Builders' Appeal" – *NIBCA's Notice of Appeal* dated Aug. 6, 2013 and filed Aug. 12, 2013 (R. Vol. 4, pp. 778-81).
"Builders' Attorney Fee Opposition" – *Motion and Memorandum to Deny Defendant's Request for Costs and Attorney Fees* dated and filed July 30, 2013 (R. Vol. 4, pp. 767-77).
"Builders' Attorney Fee Reply" – *Reply Brief in Support of Motion to Deny Defendant's Request for Costs and Attorney Fees* dated and filed Sept. 6, 2013 (R. Vol. 4, pp. 801-05).
"Builders' Response #1" – *Plaintiffs' Response to Defendant's Motion for Summary Judgment* dated and filed on December 6, 2012 (R. Vol. 2, pp. 384-400).
"Builders' Response #2" – *Plaintiffs' Response to Defendant's Motion for Summary Judgment* dated Mar. 4, 2013 and filed Mar. 5, 2013 (R. Vol. 3, pp. 577-601).
"Chatwin Affidavit #1" – *First Affidavit of Stefan Chatwin* dated Oct. 11, 2012 (R. Vol. 1, pp. 108-90).
"Chatwin Affidavit #2" – *Second Affidavit of Stefan Chatwin* dated Dec. 5, 2012 and filed Dec. 6, 2012 (R. Vol. 2, pp. 401-06).
"Chatwin Letter" – Letter from Stefan Chatwin to John R. Jameson dated October 30, 2012 (reproduced in *Second Meyer Affidavit*, Exh. 12) (R. Vol. 2, pp. 361-65).

"Complaint" – *Complaint* dated Apr. 11, 2012 and filed Apr. 12, 2012 (R. Vol. 1, pp. 15-31).

"Decision on Fees" – *Memorandum Decision and Order Granting in Park and Denying in Part Plaintiff's Motion to Deny Defendant's Requests for Costs and Attorney Fees* dated and filed Sept. 11, 2013 (R. Vol. 4, pp. 806-21).

"Decision on MSJ" – *Memorandum Decision and Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment* dated and filed Apr. 5, 2013 (R. Vol. 3, pp. 634-56).

"Hayden's Amended Appeal" – *Amended Notice of Appeal and Cross-Appeal* dated and filed Nov. 4, 2013 (R. Vol. 4, pp. 835-40).

"Hayden's Appeal #1" – *Notice of Appeal and Cross-Appeal* dated Oct. 22, 2013 and filed Oct. 23, 2013 (R. Vol. 4, pp. 828-33).

"Hayden's Attorney Fee Memo" – *City's Memorandum of Costs and Attorney Fees with Supporting Statement* dated and filed July 16, 2013 (R. Vol. 3, pp. 720-48).

"Hayden's Attorney Fee Response" – *City's Response Brief in Opposition to Builders' Motion to Deny City's Request for Costs and Attorney Fees* dated and filed Sept. 3, 2013 (R. Vol. 4, pp. 787-800).

"Hayden's MSJ" – *City's Motion for Summary Judgment* dated October 11, 2012 and filed October 15, 2012 (R. Vol. 1, pp. 68-70).

"Hayden's MSJ Brief" – *City's Opening Brief in Support of Motion for Summary Judgment* dated Oct. 11, 2012 and filed Oct. 15, 2012 (R. Vol. 1, pp. 71-107).

"Hayden's MSJ Reply #1" – *City's Reply Brief in Support of Motion for Summary Judgment* dated and filed Dec. 12, 2012 (R. Vol. 3, pp. 540-58).

"Hayden's MSJ Reply #2" – *City's Reply to Builders' Substituted Response on Motion for Summary Judgment* dated and filed Mar. 12, 2013 (R. Vol. 3, pp. 606-33).

"Hendrickson Affidavit #1" – *First Affidavit of Martin C. Hendrickson* dated and filed Mar. 12, 2013 (R. Vol. 3, pp. 602-05).

"Hendrickson Affidavit #2" – *Second Affidavit of Martin C. Hendrickson* dated and filed July 16, 2013 (R. Vol. 3, pp. 711-14).

"Jameson Affidavit #1" – *Affidavit of John R. Jameson in Support of Response to Defendant's Motion for Summary Judgment* dated and filed Dec. 6, 2012 (A.R. pp. 1-118). See comment following *Welch Comer Report.*

"Jameson Affidavit #2" – *Second Affidavit of John R. Jameson in Support of Response to Defendant's Motion for Summary Judgment* dated Mar. 4, 2013 and filed Mar. 5, 2013 (R. Vol. 3, pp. 559-76).

"Jameson Affidavit #3" – *Affidavit of John R. Jameson in Support of Motion to Deny Costs and Fees* dated and filed July 30, 2013 (R. Vol. 4, pp. 762-66).

"Jameson Letter" – Letter from John R. Jameson to Nancy Stricklin dated January 27, 2012 (reproduced in *Second Meyer Affidavit*, Exh. 4) (R. Vol. 2, pp. 330-32).

"Judgment #1" – *Judgment* dated and filed July 2, 2013 (R. Vol. 1, pp. 679-81).

"Judgment #2" – *Final Judgment* dated and filed Aug. 29, 2013 (R. Vol. 4, pp. 784-86).

"Judgment #3" – *Amended Final Judgment* dated and filed Oct. 3, 2013 (R. Vol. 4, pp. 822-24).

"Meyer Affidavit #1" – *First Affidavit of Christopher H. Meyer* dated October 11, 2012 (R. Vol. 2, pp. 204-317).

"Meyer Affidavit #2" – *Second Affidavit of Christopher H. Meyer* dated Dec. 4, 2013, filed Dec. 5, 2013 (R. Vol. 2, pp. 318-83).

"Meyer Affidavit #4" – *Fourth Affidavit of Christopher H. Meyer* dated and filed July 16, 2013 (R. Vol. 3, pp. 582-710).

"Meyer/Phillips Letters" – Letter by Christopher H. Meyer to John R. Jameson dated November 14, 2012 forwarding letter from Donna L. Phillips to Christopher M. Meyer [sic] dated November 14, 2012 (reproduced in *Second Meyer Affidavit*, Exh. 15) (R. Vol. 2, pp. 369-75).

"Notice of Transcript #1" – *Notice of Transcript Lodged* dated and filed Oct. 30, 2013 (R. Vol. 4, pp. 834).

"Notice of Transcript #2" – *Notice of Transcript Lodged* dated and filed Dec. 17, 2013 (R. Vol. 4, pp. 841).

"Order Granting SJ" – *Order Granting Summary Judgment* dated and filed July 2, 2013 (R. Vol. 3, pp. 674-78).

"Phillips Affidavit" – *First Affidavit of Donna L. Phillips* dated May 14, 2013 and filed May 16, 2013 (R. Vol. 3, pp. 657-68).

"Remand" – *Order Remanding to District Court for Final Judgment* dated Aug. 20, 2013 and filed Aug. 21, 2013 (R. Vol. 4, pp. 782-83).

"Satisfaction of Judgment" – *Satisfaction of Judgment* dated and filed Oct. 8, 2013 (R. Vol. 4, pp. 825-27).

"Stipulation" – *Stipulation Regarding Accounting Issues* (dated June 26, 2013 and filed June 28, 2013) (R. Vol. 3, pp. 669-73).

"Stricklin Affidavit" – *Affidavit of Nancy Stricklin* dated July 15, 2013 and filed July 16, 2013 (R. Vol. 3, pp. 715-19).

"Welch Comer Report" – *Welch Comer & Associates, Inc., Hayden Sewer Master Plan Update* dated December 2006 (reproduced in *Jameson Affidavit #1*, Exh. A) (A.R. pp. 5-118). "A.R." refers to the stipulated augmented record submitted by the parties. The *Welch Comer Report* also appears in the original record at R. Vol. 2, pp. 411-526 (*Jameson Affidavit #1*, Exh. A). However, the pages were in the wrong order. An additional version of the *Welch Comer Report* was later provided by the District Court and appears in the record at pages 848-964. Unfortunately, the pages in the second version were also incorrect. The parties then provided the A.R.

ARGUMENT

I. HAYDEN'S CAP FEE IS AUTHORIZED BY STATUTE.

A. Some statutory authority is required for this proprietary action.

The central premise of this case, and all illegal tax cases, is that Idaho follows Dillon's Rule. That is, the powers of local governments are limited to those granted or clearly implied by the state Constitution or legislation. *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (Donaldson, C.J.).

While the Idaho Constitution includes a broad and self-executing grant of police power to cities and counties (Idaho Const. art. XII, § 2) the power of taxation is granted only to the

Legislature (Idaho Const. art. VII, § 6). Hence, the only fees that are lawful without statutory authorization are "incidental regulatory fees" (which are considered an incident of the police power).[5] Every other fee must have some specific statutory basis. This, in turn, gives rise to mountains of litigation over whether the particular fee fits the particular statute or is really a revenue-raising tax masquerading as a fee under that statute.

Hayden does not contend, and has never contended, that its cap fee is an incidental regulatory fee. The cap fee does not fund a regulatory program and thus cannot be sustained under the police power. Rather, it is a user fee—a fee charged to a user for a city-provided service. This is a proprietary function and therefore requires statutory authorization. That authorization may be found in any of four statutes. One of them, Idaho Code § 50-301, extends home rule to Idaho cities (at least as to proprietary functions and perhaps all functions).[6] If the Court declines to find that Idaho cities have home rule, the cap fee is nevertheless authorized by three other statutes discussed below.

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[5] Examples of incidental regulatory fees are parking meters (*Foster's Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941) (Ailshie, J.)), license fees for dance halls (*State v. Bowman*, 104 Idaho 39, 655 P.2d 933 (1982) (Walters, J.)), and fees for recording wills or filing legal documents (*Brewster v. City of Pocatello*, 115 Idaho 502, 505, 768 P.2d 765, 768 (1988) (Shepard, J.)).

[6] Hayden did not become aware of this authority until recently and consequently did not present this argument to the District Court. Indeed, it has never been presented to any court so far as we can determine. In any event, there is no bar to raising it now. The Court "will uphold the decision of a trial court if any alternative legal basis can be found to support it." *Hanf v. Syringa Reality, Inc.*, 120 Idaho 364, 370, 816 P.2d 320, 326 (1991); *Martel v. Bulotti*, 138 Idaho 451, 545-55, 65 P.3d 192, 195-96 (2003). The Court has never required that the alternate basis be presented to the district court. So far as Hayden can determine, the "general rule [that] an appellate court will consider only such points as were raised in the trial court" has been applied exclusively against the party appealing the adverse ruling. *E.g., Ochoa v. State*, 118 Idaho 71, 78, 794 P.2d 1127, 1134 (1990) (applying rule against appellant); *Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 145 Idaho 208, 216, 177 P.3d 955, 963 (2008) (same); *Johannsen v. Utterbeck*, 146 Idaho 423, 429, 106 P.3d 341, 347 (2008) ("Appellant procedurally defaulted on this issue by raising it for the first time on appeal."). This makes sense: the rule is for "the protection of inferior courts," to ensure they are not overturned on the basis of arguments not presented to them. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991).

B. Hayden's cap fee is authorized by Idaho Code § 63-1311.

(1) Section 63-1311 expressly authorizes cities to impose user fees for any service that could have been funded through *ad valorem* taxes.

In 1980 the Idaho Legislature enacted Idaho Code § 63-1311, which authorizes taxing districts (including cities[7]) to charge fees for services provided. The legislation provides:

> (1) Notwithstanding any other provision of law, the governing board of any taxing district may impose and cause to be collected fees for those services provided by that district which would otherwise be funded by property tax revenues. The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered.

Idaho Code § 63-1311(1).[8]

The legislative history to the 1980 enactment (H.B. 680, based on R.S. 5694) confirms that the legislation means what it says.[9] Of course, resort to legislative history is appropriate

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[7] "'Taxing district' means any entity or unit with the statutory authority to levy a property tax." Idaho Code § 63-201(23).

[8] When enacted in 1980, the first sentence of what is now section 63-1311(1) was enacted and codified as Idaho Code § 63-2201A. H.B. 680, 1980 Idaho Sess. Laws ch. 290 § 2. In 1988, section 63-2201A (now section 63-1311(1)) was amended to add what is now the second sentence. S.B. 1340, 1988 Idaho Sess. Laws ch. 201 § 3. In 1996, the entire revenue and taxation code was re-enacted, and section 63-2201A was recodified as section 63-1311. H.B. 836, 1996 Idaho Sess. Laws ch. 98 § 14 at 393; see also 1996 Idaho Sess. Laws ch. 322 § 7 (correcting cross-reference to section 63-1311 in section 31-870). In 1997, the provision was renumbered as section 63-1311(1), and what is now section 63-1311(2) was added. 1997 Idaho Sess. Laws ch. 117 § 35 at 333.

A virtually identical provision authorizes county governments to impose such user fees. Idaho Code § 31-870. Both section 31-870 and the predecessor of section 63-1311 were enacted via the same bill in 1980 (H.B. 680, 1980 Idaho Sess. Laws ch. 290). It is unclear why both sections are needed.

[9] The legislative history is set out in *Meyer Affidavit #1* Exh. A, B & C (R. Vol. 2, pp. 204-317). It confirms that the statute was intended to authorize all taxing authorities to impose user fees where the charge is for "garbage, water and sewage" (Minutes of the House Revenue and Taxation Committee (Feb. 29, 1980)) and other "functions that are clearly user oriented" (Minutes of House/Senate Legislative Council, Committee on Local Government Revenues, at 3 (Sept. 10, 1986)). "The purpose of this legislation is to give county commissioners and the governing boards of other taxing districts the power to collect fees for services in lieu of ad valorem taxes." Statement of Purpose (R.S. 5694). "Mr. Young explained that RS 5694 is permissive legislation for those levies that county commissioners do not have the power to impose. It will allow authority which many already have." Minutes of the Munger Subcommittee of the House Committee on Revenue and Taxation (Feb. 28, 1980). "Mr. Young explained that the purpose of RS 5694 is to allow county commissioners and governing boards of other taxing districts the authority to collect fees in lieu of ad valorem taxes. Many are now already doing this and this makes it all inclusive. Some examples of those fees are: garbage, water and sewage. Mr. Munger stated that it is permissive legislation and is not mandatory." Minutes of the House Revenue and Taxation Committee (Feb. 29, 1980).

only where the meaning of the statute itself is unclear.[10]

In 1988, the statute was amended by adding this sentence: "The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the services being rendered." S.B. 1340, 1988 Idaho Sess. Laws ch. 201 (amending Idaho Code §§ 31-870 and 63-2201A (now section 63-1311(1)). The legislative history of the 1988 amendment reinforced the purpose of the original legislation.[11]

The bottom line is that section 63-1311 provides simple, direct, and unambiguous authority for the imposition of user fees for services rendered by a city that might otherwise be funded by *ad valorem* taxes. This is true with or without the legislative history. The only question is whether Hayden's cap fee is, in fact, a user fee as contemplated under the statute. The cases discussed below show that Hayden's fee easily meets the test for a user fee and therefore falls within the statute.

"Chuck Holden, Association of Idaho Counties, stated H 680 adds to the existing law to allow counties and taxing districts to impose fees for providing services which are normally funded by ad valorem tax revenues. Cities have had this authority for a number of years and haven't abused it and we feel the counties should have it. Much discussion followed." Minutes of Senate Local Government and Taxation Committee (Mar. 22, 1980). "H680 Tax and Taxation – Adds to existing law to allow counties and taxing districts to impose fees for providing services which are normally funded by ad valorem tax revenues." Official computer summary of legislation by House Revenue and Taxation Committee (tracking action through passage on Ap. 1, 1980).

[10] *Verska v. St. Alphonsus Regional Medical Center*, 151 Idaho 889, 895-86, 265 P.3d 502, 508-09 (2011) (Eismann, J.). Here, the language is clear, and Hayden does not suggest that the legislative history is necessary to understand the statute. Nevertheless, Hayden presents the entire relevant statutory history so that the Court may examine it if it deems appropriate.

[11] "The concept of this bill is to start the move to fund those functions that are clearly user oriented with fees collected from the users themselves, rather than have so much reliance on ad valorem tax." Minutes of House/Senate Legislative Council, Committee on Local Government Revenues, at 4 (Sept. 10, 1986) (regarding R.S. 12966 in 1986, which initially was limited to amending Idaho Code § 49-158 dealing with motor vehicle fees; that bill was replaced by S.B. 1304AA in 1988 which added the provisions amending sections 31-870 and 63-2201A).

(2) The cap fee meets the *Brewster* test because it is based on the user's consumption of services.

In *Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1988), this Court discussed the scope and effect of section 63-1311(1) (then codified at section 63-2201A). That case struck down Pocatello's fee as falling outside the statute, but it established principles under which Hayden's fee should be upheld. When voters rejected bonds for street maintenance, Pocatello attempted an end run by imposing a "street restoration and maintenance fee" on all property owners. Property owners challenged the fee as an unauthorized tax. The city contended it was an incidental regulatory fee and/or a service fee authorized by the predecessor to section 63-1311(1). *Brewster*, 115 Idaho at 503, 768 P.2d at 766.

The Court first noted that the fee charged was not an incidental regulatory fee of the sort allowed under *Foster's Inc.* (see footnote 5 at page 15) because "the revenue to be collected from Pocatello's street fee has no necessary relationship to the regulation of travel over its streets, but rather is to generate funds for the non-regulatory function of repairing and maintaining streets." *Brewster*, 115 Idaho at 504, 768 P.2d at 767.

It bears emphasis that Pocatello defended its street maintenance fee as an incidental regulatory fee, while Hayden defends its cap fee as a user fee.[12] *Brewster* is nevertheless instructive because it went on to analyze the alternative defense that Pocatello's fee might be justified under section 63-2201A (the predecessor to section 63-1311).

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[12] Another illegal tax case defended (unsuccessfully) as an incidental regulatory fee was *Idaho Building Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 126 Idaho 740, 890 P.2d 326 (1995) (Trout, J.). In *IBCA*, the Court struck down the Coeur d'Alene's impact fee, which the city required as a precondition to the issuance of a building permit "to pay for a proportionate share of the cost of improvements needed to serve development." *IBCA*, 126 Idaho at 741, 890 P.2d at 327. The fees were not targeted or quantified for any particular use or service, but were generally "spent on capital improvements serving such things as libraries, police, fire, and streets. *IBCA*, 126 Idaho at 741-42, 890 P.2d at 327-28. Coeur d'Alene (like Pocatello) defended the fee as an exercise of its police power. *IBCA*, 126 Idaho at 743, 890 P.2d at 329. The Court analyzed it as an incidental regulatory fee, and found it fell short. Hayden's cap fee bears no resemblance to that fee either.

The Court found that the statute did indeed authorize user fees for services provided, but did not authorize "a *tax* upon users or abutters of public streets." *Brewster*, 115 Idaho at 504, 768 P.2d at 767 (emphasis original). The Court found that Pocatello's street fee was nothing more than "a tax imposed for the privilege of owning property." *Id.*

In reaching this conclusion, the Court contrasted Pocatello's street fee with a legitimate user fee—establishing a test that Hayden easily meets.

> We agree with appellants that municipalities at times provide sewer, water and electrical services to its residents. However, those services, in one way or another, are based on user's consumption of the particular commodity, as are fees imposed for public services as the recording of wills or filing legal actions. In a general sense a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs.

Brewster, 115 Idaho at 505, 768 P.2d at 768 (emphasis added).

For the very reason that Pocatello's fee failed in *Brewster*, Hayden's fee passes muster here—not as an incidental regulatory fee but as a user fee. Indeed, Hayden's cap fee is precisely the sort of legitimate user fee described by the Court as being authorized by statute—a fee for sewer services based on the "user's consumption of the particular commodity." *Id.*

As the District Court below aptly concluded:

> Despite Plaintiffs' contentions to the contrary, the City's capitalization fee is imposed in direct relation to the hook-up to the City's sewer system and the cost is calculated accordingly. The fee is calculated using a formula which essentially determines the cost of replacing the capacity that each new user has consumed.

Decision on MSJ at 13 (R. Vol. 3, p. 646).

The District Court was right. Each new user consumes a portion of Hayden's existing collection system capacity and is charged a fee in proportion to that consumption. This type of consumption-based user fee is exactly what the Court in *Brewster* said was permissible.

Moreover, Hayden's fee easily satisfies the statutory test set out in section 63-1311(1) requiring that the fees "be reasonably related to, but shall not exceed, the actual cost of the service being rendered." Hayden's cost calculation, and how it relates to the actual cost of replacement, is explained in detail in *Chatwin Affidavit #1* (R. Vol. 1, pp. 108-90).

Builders concede that Hayden is authorized to charge a user fee under *Brewster*, *IBCA*, and Idaho Code § 63-1311. Instead they complain that the cap fee is not a proper user fee because it is based on the replacement cost rather than the original construction cost of the infrastructure consumed by the new user. *Appellants' Brief* at 10. But they fail to explain what is wrong with using the replacement cost as the basis of the fee. *Brewster* does not speak to the question, and section 63-1311(1) merely requires that the fee be based on "the actual cost." It is perfectly reasonable for a city to base "the actual cost" on the actual cost of replacing the consumed good so that it will have the funds necessary to continue to provide the good to newcomers. Indeed, this is exactly what the *Viking* Court said was reasonable in the context of the Idaho Revenue Bond Act, discussed below in section I.C(2)(c) at page 27.

(3) *Kootenai Property Owners* confirms that future benefits may be included in user fees and further reinforces the conclusion that Hayden's fee is a proper user fee.

The year after *Brewster*, the Court upheld Kootenai County's mandatory solid waste disposal fee in *Kootenai County Property Owners Assn. v. Kootenai County* ("*Kootenai Property Owners*"), 115 Idaho 676, 769 P.2d 553 (1989) (Bakes, J.). *Kootenai Property Owners* was not based on Idaho Code § 63-1311; instead, the county relied on another specific statutory authorization for fees to fund solid waste programs, Idaho Code § 31-4404. But the principle is identical. Under the statute, there was no doubt that counties had authority to charge a fee for

solid waste services. The only question was whether Kootenai County's fee was in the nature of a user fee or just a disguised tax.

The plaintiffs contended that it was not really a user fee because (1) it was imposed on all homeowners whether they chose to use the landfill services or not, (2) the fee was not precisely tailored to match the quantity of services consumed, and (3) it funded a future benefit (acquisition and preparation of new landfill sites) rather than providing an immediate "service." The third argument is the gravamen of Builders' lawsuit.

First, the Court rejected the idea that a charge for service must be voluntary in order to qualify as a user fee. *Kootenai Property Owners*, 115 Idaho at 679, 769 P.2d at 556. Second, the Court ruled that it is not necessary that the fee be based precisely on how much garbage is generated and that a flat fee for residential use is reasonable.

> A solid waste disposal system is comparable to a sewer system. Charging a flat residential sewage fee is reasonable even though the actual use (outflow volume) varies somewhat from house to house. The legislature has not imposed exacting rate requirements upon localities for measuring actual residential solid waste disposal or sewage use. Reasonable approximation is all that is necessary.

Kootenai Property Owners, 115 Idaho at 678-79, 769 P.2d at 555-56 (citation omitted) (emphasis supplied).

Finally, and most importantly, the Court rejected the plaintiffs' argument that the solid waste charge was not a fee because "it would not provide an immediate benefit, but rather would only provide a future benefit, *i.e.*, acquisition and preparation of new landfill sites." *Kootenai Property Owners*, 115 Idaho at 679, 769 P.2d at 556. Whether the fee is used to fund immediate services or the acquisition of new sites makes no difference, said the Court, because both were authorized activities under the statute. *Id.*

As noted above, the Court was referring to a different statute (Idaho Code § 31-4404) than the one involved here (Idaho Code § 63-1311(1)). But the same result obtains under either statute. Indeed, section 63-1311(1) is even broader than the one that was sufficient to uphold the user fee in *Kootenai Property Owners*. Section 63-1311(1) authorizes user fees for anything a city is authorized to fund with *ad valorem* taxes. That obviously includes constructing expansions to Hayden's sewer connection system. As the District Court correctly concluded, "both future expansion and replacement of existing capacity are authorized by the statute, I.C. § 63-1311." *Decision on MSJ* at 11 (R. Vol. 3, p. 644).[13]

In sum, the *Kootenai Property Owners* case is on all fours with the instant litigation, and it destroys Builders' argument that Hayden's user fee cannot fund infrastructure for future use.

C. Hayden's cap fee is also authorized by the Idaho Revenue Bond Act.

(1) *Loomis* held that the Idaho Revenue Bond Act provides a statutory basis for user fees and reserved the question of using fees for future expansion.

An independent basis for Hayden's cap fee is found in the Idaho Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042. It contains the following key provisions authorizing user fees:

> In addition to the powers which it may now have, any city shall have power under and subject to the following provisions:
>
> (a) To acquire by gift or purchase and to construct, reconstruct, improve, better or extend any works within or without the city, or partially within or partially without the city, or within any part of the city, and acquire by gift or purchase lands or rights in lands or water rights in connection therewith, including

[13] The District Court continued on this point, noting that Idaho Code § 63-1311 "does not speak specifically to the collection of fees for expansion, acquisition, or replacement, but it does allow for the collection of fees for services provided which would otherwise be funded by ad valorem tax revenues." *Decision on MSJ* at 11 (R. Vol. 3, p. 644). The District Court then cited Idaho Code § 42-3213, which applies to sewer districts, as the authority for *ad valorem* taxes. *Id.* Hayden respectfully suggests that the District Court should have referred to Idaho Code §§ 50-235, 50-1007. But this is of no consequence. There is no doubt that cities are authorized to build sewer systems and to pay for them through *ad valorem* taxes.

> easements, rights-of-way, contract rights, leases, franchises, approaches, dams and reservoirs; to sell excess or surplus water under such terms as are in compliance with section 42-222, Idaho Code, and deemed advisable by the city; to lease any portion of the excess or surplus capacity of any such works to any party located within or without the city, subject to the following conditions: that such capacity shall be returned or replaced by the lessee when and as needed by such city for the purposes set forth in section 50-1028, Idaho Code, as determined by the city; that the city shall not be made subject to any debt or liability thereby; and the city shall not pledge any of its faith or credit in aid to such lessee;
>
> . . .
>
> (f) To prescribe and collect rates, fees, tolls or charges, including the levy or assessment of such rates, fees, tolls or charges against governmental units, departments or agencies, including the state of Idaho and its subdivisions, for the services, facilities and commodities furnished by such works, or by such rehabilitated existing electrical generating facilities, and to provide methods of collections and penalties, including denial of service for nonpayment of such rates, fees, tolls or charges;

Idaho Code § 50-1030 (emphasis supplied).

The term "works" referenced in subsection 50-1030 is defined to include "water systems, drainage systems, sewerage systems, recreational facilities, off-street parking facilities, airport facilities, air-navigation facilities, [and] electrical systems." Idaho Code § 50-1029(a). The "works" may be located inside or outside of the city. Idaho Code § 50-1030(a).

Read together, these provisions make clear that cities are authorized to charge user fees for the specified "works," and that revenue from those fees may be used for future expansion of the "works."

This is confirmed by Idaho case law. In *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991) (Boyle, J.), city residents challenged the City of Hailey's cap fee, which they called an "equity buy-in." The Court recognized that some fees may be upheld as incidental regulatory fees. *Loomis*, 119 Idaho at 437, 807 P.2d at 1275. This fee, however, did not fall into

that category of police power functions. Instead, the Court analyzed the equity buy-in as a "proprietary" function of the city. *Loomis*, 119 Idaho at 437-38, 807 P.2d at 1275-76.

In other words, the fee could be upheld even if it was not imposed under the city's police power, so long as there was legislative authority for the action. The Court then ruled that the fee was authorized under the Idaho Revenue Bond Act. "Thus, when rates, fees and charges conform to the statutory scheme set forth in the Idaho Revenue Bond Act or are imposed pursuant to a valid police power, the charges are not construed as taxes." *Loomis*, 119 Idaho at 438, 807 P.2d at 1276.

The Court launched into a detailed discussion of what was allowed under the Idaho Revenue Bond Act, reading those requirements generously and deferentially as to cities. The Court rejected plaintiffs' contention that the connection fee was too steep and should have been limited to the actual cost of the connection. The Court found that the Idaho Revenue Bond Act gives cities broad flexibility in setting fees, and that the city's approach was not unreasonable. *Loomis*, 119 Idaho at 441-44, 807 P.2d at 1279-82.

Recall that in *Kootenai Property Owners*, the Court ruled that it was permissible for the user fee to be used for a "future benefit"—in that case future acquisition of new landfill sites. In *Loomis*, the Court found it unnecessary to revisit this question, because the city had tailored its equity buy-in fee so that it was not used to fund future expansion of the sewer system.[14] *Loomis*, 119 Idaho at 439-40, 807 P.2d at 1277-78. In a footnote, the *Loomis* Court noted that "[s]ince the precise issue of whether fees may be collected for future expansion of a sewer or water

[14] This restriction was imposed, by the way, as a result of the city's compliance with an earlier district court decision mentioned by the *Loomis* Court. That decision, by the way, was plainly wrong—given the decision in *Kootenai Property Owners*. Nevertheless, for whatever reason, the City of Hailey chose not to appeal.

system is not before us on this appeal, we leave for another day the determination of that issue." *Loomis*, 119 Idaho at 439 n.3, 807 P.2d at 1277 n.3.

In sum, the *Loomis* decision stands squarely for the proposition that the Idaho Revenue Bond Act authorizes cities to charge a connection fee for sewer hook-ups and that cities have broad flexibility in designing that fee structure. There is nothing in *Loomis* suggesting that such fees may not be used for future expansion of service infrastructure. That question was reserved and answered in the affirmative in *Viking Constr., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 233 P.3d 118 (2010) (Eismann, C.J.) (discussed below).

(2) *Viking* held that the Irrigation District Bond Act authorizes future expansions and applies even if no bonds are issued.

(a) The Irrigation District Bond Act is functionally identical to the Idaho Revenue Bond Act; both authorize cap fees irrespective of whether bonds are issued.

In *Viking*, a land developer challenged a domestic water system connection fee charged by the Hayden Lake Irrigation District (an entity that provided both irrigation and domestic water supplies). Relying on *Loomis*, the irrigation district defended the fee under section 43-1909 of the Irrigation District Domestic Water System Revenue Bond Act, Idaho Code §§ 43-1906 to 43-1920 ("Irrigation District Bond Act").

The Court found that to be a no-brainer. "The [district] court compared this provision with the identical language in Idaho Code § 50-1030(f) [the Idaho Revenue Bond Act], which this Court held in *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991), authorized a city to collect a sewer and water connection fee. Since there is no basis for giving differing constructions to the identical language in the two statutes, Idaho Code § 43-1909(e) authorizes charging a connection fee to connect to an irrigation district's domestic water system." *Viking*,

149 Idaho at 191, 233 P.3d at 122.

The plaintiff in *Viking* contended, however, that the bond act could not be used to justify the fee, because the irrigation district had not issued bonds. The Court rejected that argument, ruling that the act was clear on its face and that it unambiguously authorized user fees irrespective of whether bonds were issued. *Viking*, 149 Idaho at 193, 197, 233 P.3d at 124, 128.[15]

Thus, it follows that Hayden may rely on the authority granted by section 50-1030 of the Idaho Revenue Bond Act to justify fees for "works" defined under the act irrespective of whether Hayden has issued revenue bonds for those "works."[16]

(b) The bond acts authorize use of fees for future expansion.

Now we turn to the question of whether user fees are authorized for future expansion. Recall that *Kootenai Property Owners* answered this question in the affirmative and that *Loomis* set that question aside. In *Viking*, the question was presented again and, again, answered in the affirmative.

Viking complained that "the primary purpose of the hook-on fees was to pay for future capital assets and future improvements required due to population growth" (*Viking*, 149 Idaho at 196, 233 P.3d at 127) and that the act "prevents the Irrigation District from accumulating reserves with the connection fees" (*Viking*, 149 Idaho at 197, 233 P.3d at 128). The Court rejected these arguments (consistent with its earlier ruling in *Kootenai Property Owners*):

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[15] While the Court ruled that the authorities set out in Idaho Code § 50-1030 (and corresponding section 43-1909) are applicable irrespective of whether bonds have been issued, it held that other provisions of the bond acts (Idaho Code §§ 50-1032 and 50-1033 and corresponding sections 43-1911 and 43-1912) do not come into play unless bonds are issued.

[16] The *Viking* Court went on to rule that there was a material fact in dispute (and therefore denied summary judgment) on the question of whether the particular fee was reasonable.

> The powers of an irrigation district under the Irrigation District Bond Act include "to construct, reconstruct, improve, better or extend any works within or without the district" and "[t]o operate and maintain any works within or without the boundaries of the district." I.C. § 43–1909(a) & (c). Spending revenues from connection fees for these purposes would be consistent with the Act.

Viking, 149 Idaho at 197, 233 P.3d at 128 (emphasis supplied).

Thus, any doubt left on the subject by *Loomis* is eliminated by *Viking*. Cities, even those that have not issued revenue bonds, may employ user fees to "provide a reserve for improvements to their works" and may spend such money "to construct, reconstruct, improve, better or extend any works."

(c) Hayden's cap fee is reasonably based on the replacement cost of the system capacity used.

The *Viking* Court emphasized the point, first made in *Loomis*, that cities have broad discretion in determining how to quantify the cap fee, and that the fee may be based on the replacement cost of the system capacity consumed—exactly what Hayden has done:

> Thus, this section permitted the Irrigation District to charge new users of the domestic water system a connection fee that included an amount equal to the value of that portion of the system capacity that the new user will utilize at that point in time.
>
> The Irrigation District had discretion to decide what methodology to use in order to determine that value. For example, it is entitled to use replacement cost rather than historical cost as the basis of its calculations. The court's limited role is simply to determine whether the methodology used to determine the value is reasonable and not arbitrary.

Viking, 149 Idaho at 194, 233 P.3d at 125 (emphasis supplied) (citing *Loomis*, 119 Idaho at 443-44, 807 P.2d at 1281-82). Thus, the very issue presented here—Hayden's use of replacement cost for system capacity consumed by the new user—was decided in *Viking*.

Alas, the irrigation district in *Viking* did a rather sloppy job of developing its connection

fee. For instance, the district did not even hire an engineer. This resulted in a remand. *Viking*, 149 Idaho at 195, 233 P.3d at 126. Hayden has not made the same mistake. Its state-of-the-art Sewer Master Plan Update (the *Welch Comer Report*) is a model for what cities should do.

Builders complain: "No portion of the fee is used for maintenance, repair, or upkeep of the existing system (the City has a bi-monthly fee to cover that), and the fee has no relation to the value of the existing system." *Appellants' Brief* at 7. Let us pick that apart. The first part is true, and it is a good thing. Hayden has carefully avoided either basing the fee on or using the fee revenue for maintenance, repair, or upkeep of the system. It has meticulously calculated the fee based on the cost of replacement of the system capacity consumed by the new user. *Chatwin Affidavit #1* (R. Vol. 1, pp. 108-18). The second part of Builders' statement reflects a fundamental misunderstanding of the law. Apparently, what Builders mean is that the cap fee is illegal because it is not based on the historical cost of the system capacity consumed by the new user. But that is only one way to calculate a reasonable fee. As noted above, the *Viking* Court expressly ruled that another valid approach is to measure that value in terms of replacement cost of the system capacity consumed.

(3) Hayden's cap fee satisfies the opt-out requirement in *Waters Garbage* and *Lewiston Independent*.

In *Kootenai Property Owners*, 115 Idaho at 678, 769 P.2d at 555, the Court held local governments may require local residents to use a public service such as trash collection, and that such fees still qualify as a user fee despite their mandatory nature. Two cases have carved out an exception to this—where there is a practical and lawful way for residents to obtain the service elsewhere. *Waters Garbage v. Shoshone County*, 138 Idaho 648, 67 P.3d 1260 (2003); *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 151 Idaho 800, 264 P.3d 907 (2011).

Waters Garbage and *Lewiston Independent* pose no problem for Hayden, because Hayden's cap does not apply to persons who do not use the City's sewer collection system. In other words, there is an opt-out provision.[17]

(4) The provisions of the Idaho Revenue Bond Act dealing with "ordinary and necessary" expenses are inapplicable here because Hayden is incurring no debt or liability.

NIBCA contends that the cap fee is not authorized by the Idaho Revenue Bond Act because it is not an "ordinary and necessary" expense. *Appellants' Brief* at 6-7. The "ordinary and necessary" exception has nothing to do with this case. This provision (found in both Idaho Const. art. VIII, § 3 and the Idaho Revenue Bond Act) requires cities to hold elections before incurring debt or liability except in the case of "ordinary and necessary" expenses. It has no applicability here because Hayden it is not incurring any debt or liability. After all, the whole point of the cap fee is to avoid going into debt.[18]

Builders cite two cases. The first, *Loomis v. City of Hailey*, 119 Idaho 434, 440, 807 P.2d 1272, 1278 (1991), mentions the ordinary and necessary exception, but only to explain why another case—*O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956)—was inapposite.[19] The plaintiffs in *Loomis* argued that *O'Bryant* and similar cases helped them. The

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[17] As explained in *Chatwin Affidavit#1*, some developments within Hayden have the option of connecting to the Hayden Lake Recreational Water & Sewer District instead of Hayden's sewer collection system. They are not charged a fee by Hayden. If no connection to the City's sewer system is required, then no sewer capitalization fee is charged. Of course, new developments are required to connect to some sewer system. Wastewater Services Chapter § 8-1-3(B)(2) (*Chatwin Affidavit #1* (R. Vol. 1, at pp. 110-11); *Chatwin Affidavit #1*, Exh. B (R. Vol. 1, p. 131)).

[18] This should not come as a surprise to Builders. As the City explained in its *Answer*, ¶ 33 at 11 (R. Vol. 1, p. 61): "Collecting money from sewer utility fees is not an incursion of debt. Having money in the bank is the opposite of debt. Nor does spending money that has been previously collected constitute the incursion of debt."

[19] In *O'Bryant*, the City of Idaho Falls granted a franchise to a company to create a gas distribution system serving city residents, including a fifty-mile pipeline from Pocatello. That Court noted that the city could not fund such a measure itself without incurring debt. *O'Bryant*, 78 Idaho at 320, 303 P.2d at 675. The Court said it would "pierce the corporate veil" because the franchise in reality was "an instrumentality of" the city and a subterfuge for allowing it to incur the financial obligation of constructing and operating a gas distribution system without a vote of

Loomis Court rejected that argument. "In the instant case the City of Hailey is not incurring any indebtedness and voter approval pursuant to art. 8, § 3 of the Idaho Constitution is required only when the city is incurring indebtedness." *Loomis*, 119 Idaho at 440, 807 P.2d at 1278. The same is true here.

Builders wander off the field again in citing *City of Boise v. Frazier*, 143 Idaho 1, 137 P.3d 388 (2006) (Burdick, J.). *Frazier* was a straight-up bonding case in which the Court determined that revenue bonds issued for the Boise Airport were ordinary but not necessary, therefore requiring an election. *Frazier* is inapplicable where, as here, no bond debt is incurred.

D. Hayden's cap fee is authorized by Idaho Code § 50-323.

Idaho Code § 63-1311 and the Revenue Bond Act have received most of the attention in cases involving sewer fees. It appears, however, that a third statute, Idaho Code § 50-323, also authorizes these fees. It provides: "Cities are empowered to establish, create, develop, maintain and operate domestic water systems . . . and to do all things necessary to protect the source of water from contamination."

In *Alpert v. Boise Water Corp.*, 118 Idaho 136, 143, 795 P.2d 298, 305 (1990) (Boyle, J.), the Court cited section 50-323 and another statute, noting: "It is undisputed that municipal corporations in Idaho have the power to operate their own utility systems and provide water, power, light, gas and other utility services within the city limits."

Section 50-323 is also discussed in *City of Grangeville v. Haskin*, 116 Idaho 535, 777 P.2d 1208 (1989) (Johnson, J.) which struck down an ordinance authorizing the actions against

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the qualified electors. *O'Bryant*, 78 Idaho at 324-25, 303 P.2d at 677-78 (described in *Loomis*, 119 Idaho at 440, 807 P.2d at 1278).

Nothing of the sort is occurring here. Indeed, Hayden sought and received voter approval for $3.9 million dollars in bonding authority for the City's share of anticipated costs of federally mandated upgrades to HARSB's regional water treatment plant. So far, those bonds have not been issued. *Chatwin Affidavit #1* ¶¶ *40-42* (R. Vol. 1, at p. 117).

landlords to collect sewer fees charged to and unpaid by tenants. The strong implication of the case, however, is that section 50-323 (together with principles of contract law) authorizes cities to impose fees for sewer service. The district court ruled for city, finding that Idaho Code §§ 50-323 and 50-1030(f) authorized such fees, and that Idaho Code § 50-1813 authorized the imposition of a lien on property to collect such fees. This Court reversed only as to the lien issue, *Grangeville*, 116 Idaho at 537, 777 P.2d at 1210, and had no trouble with the city charging the user for such fees, *Grangeville*, 116 Idaho at 538-39, 777 P.2d at 1211-12.

E. Idaho Code § 50-301 grants home rule to cities.

This Court could affirm the District Court's holding that the cap fee is authorized by the three statutes discussed above. There may, however, be a simpler approach—home rule.

It is well established that Idaho is a Dillon's Rule state, and that Idaho's Constitution extends home rule only to the police power. The authors of two law review articles, however, contend that a statutory amendment in 1976 contains a broad grant that extends home rule in Idaho past the police power. Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143 (1977); James S. Macdonald & Jacqueline R. Papez, *Over 100 Years Without True "Home Rule" in Idaho: A Time for Change*, 46 Idaho L. Rev. 587, 608 (2010).

Idaho Code § 50-301 sets out the basic authorities of cities. In 1976, the Idaho Legislature amended the statute to read as follows:

> 50-301. CORPORATE AND LOCAL SELF-GOVERNMENT POWERS. Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city;

> and exercise ~~such other powers as may be conferred by law~~ all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.

Idaho Code § 50-301 (showing amendment made by R.S. 685, H.B. 422, 1976 Idaho Sess. Laws ch. 214 § 1).

Prior to its revision in 1976, the statute contained an explicit recognition of the Dillon's Rule limitation (limiting a city's powers to those "conferred by law").[20] The 1976 amendment struck that provision, replacing it with what a sweeping grant of home rule, albeit still subject to any limitations imposed by the Legislature. Yet no Idaho court has so ruled, or even considered the matter. Although several post-1976 decisions (*e.g., Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (Donaldson, C.J.)) have reiterated the applicability of Dillon's Rule in Idaho, none has discussed the effect of Idaho Code § 50-301.

Professor Moore[21] was skeptical that the 1976 amendment granted across-the-board home rule status (including the power to tax), but he thought it rather plain that the amendment granted home rule status as to proprietary functions. "Third, and perhaps most important, the amendment can be viewed as granting to cities all private—corporate, proprietary, and administrative—powers, except where the existence of such power is reserved to the legislature by the Constitution or is expressly prohibited or comprehensively set forth by statute." Moore (1977), at 171. He concluded:

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[20] In 1976 the Idaho Attorney General concluded that the pre-amendment statute did not extend home rule past the constitutional grant of police power authority. "Idaho cities and counties do not enjoy constitutional home rule powers in local matters which fall outside the realm of local police powers. . . . [N]either Section 50-301, Idaho Code, nor Section 50-302, Idaho Code, can be considered a grant of legislative home rule regarding matters beyond the realm of police powers." Idaho Attorney General Opinion No. 76-3 at 7 (Jan. 20, 1976) (Wayne Kidwell, A.G.) (reproduced as Exhibit B to this brief).

[21] Professor Moore was an adjunct law professor at the time; he is now in private practice in Boise.

> Under this interpretation, a city would not have to point to a specific statute in order to justify engaging in some proprietary activity. Although the city would still be subject to constitutional and statutory fiscal debt limitations, and to the general restriction that all activities of the city must be for a public purpose, a city could engage in many functions not expressly authorized by law.

Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 170-71 (1977).

Professor Macdonald would go a step further. "Enactment of this legislation would permit the exercise of true local self-government in Idaho." Macdonald at 607. In other words, he views the 1976 amendment as establishing true home rule as to all local matters, including the power to tax, though still subject to legislative oversight. That, too, is a plausible reading of the amendment. After all, a grant of authority to "exercise all powers and perform all functions of local self-government" appears to be all encompassing.

In the event that the Court finds the language of section 50-301 to be ambiguous, Hayden has attached the legislative history of the 1976 amendment as Exhibit A to this brief. It clearly reinforces the broad sweep of this grant of power. The Statement of Purpose reads:

> The purpose of this bill is to grant a limited form of local self-government authority to Idaho's cities. Currently, Idaho's cities may exercise only those powers and perform only those functions specifically mentioned in the Constitution of the State of Idaho or in the Idaho Code. If the Constitution and the Code are silent, cities may not act. Unlike the state government, which may exercise any power and perform any function not prohibited by the United States Constitution, Idaho's cities do not have "residual powers." They may act only if they have been specifically authorized to act—and only in the manner prescribed by the Idaho Constitution or the Idaho Code.
>
> Enactment of this bill would provide Idaho's cities with real local control over local affairs by permitting them to exercise those powers and perform those functions not specifically prohibited by or in conflict with the Idaho Constitution or the Idaho Code. Because the Idaho Code is presently so restrictive, the immediate impact of the enactment of this bill would not be

> great. It would, however, establish a general framework from which meaningful local self-government could be constructed over a period of time.

Statement of Purpose for RS 685 and HB 422 (1976) (emphasis supplied) (reproduced in Exhibit A to this brief).

Lest there be any mistake, the testimony of Dr. James Weatherby expressly identified home rule as the purpose and effect of the legislation:

> Mr. Weatherby told the committee that the purpose of this bill is to grant a limited form of local self-government authority to Idaho cities. Currently, Idaho's cities may exercise only those powers and perform only those functions specifically mentioned in the Constitution of the State of Idaho or in the Idaho Code. Mr. Weatherby said that the cities should be given those authorities that are not granted by the Constitution and the Idaho Code. With the passage of H 422 the Legislature would give them home rule, then we can come back and propose to the Legislature areas we feel that are too restrictive or in conflict with the Code. This is a most limited form of home rule. Does not provide areas beyond the control of the Legislature.

Testimony of Dr. James Weatherby, *Minutes of the House Local Government & Taxation Committee* at 1-2 (Mar. 10, 1976) (emphasis supplied) (reproduced in Exhibit A to this brief). When Dr. Weatherby describes this as limited home rule, he means that, unlike in some foreign jurisdictions, the Idaho Legislature retains complete power to curtail the cities' authority through legislative action. But this is home rule nonetheless. Unless the Legislature affirmatively prohibits the cities from doing so, cities are free to act as to any matter of local concern.

The legislative history reflects concerns raised by some (including the Idaho Association of Commerce and Industry, the Association of Idaho Taxpayers, and Senator Risch) that the bill should be amended so as not to extend home rule to matters of taxation.[22] No such limiting

[22] The minutes to the March 10, 1976 hearing refers to an attached "testimony" by Paul Ennis. No such attachment exists in the State's official legislative history, and Hayden has been unable to locate this document. The legislative history also references Attorney General Opinion 76-3. Hayden obtained a copy of that opinion, which is

amendments were adopted.

Here is a fair question: If the 1976 amendment created home rule, why would the Legislature enact section 63-1311 in 1980? After all, if cities have home rule (either Professor Macdonald's true home rule or Professor Moore's home rule as to proprietary matters), why do they need a statute authorizing the imposition of user fees?

The quick answer is that they do not. Recall that the 1980 legislative history discussed in section I.B(1) repeatedly noted that cities already had this authority, and the purpose of the 1980 legislation was to extend it to other taxing authorities. For example: "Cities have had this authority for a number of years and haven't abused it and we feel the counties should have it." Minutes of Senate Local Government and Taxation Committee (Mar. 22, 1980). See footnote 9 at page 16 for additional legislative history on this point.

The simplest conclusion to this litigation would be the one suggested by Professor Macdonald—to declare that the laborious and contentious exercise of determining what is a fee and what is a tax was done away with by the Legislature in 1976 as to cities. That body of law would remain, of course, for counties and other units of local government. Thus, absent an express statutory prohibition or other issue (such as takings, equal protection, or unlawful bonding), cities would be free to establish either fees or taxes for any legitimate local purposes.

The more modest approach suggested by Professor Moore would not eliminate the tax-versus-fee debate. But it would eliminate the need to parse the words of specific statutes like section 67-1311(1) or the Idaho Revenue Bond Act to find authority for cities to construct sewer systems and to charge for them. Because building and charging for sewer systems is plainly a

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appended hereto as Exhibit B. That opinion concluded that section 50-301 does not extend home rule status beyond the police power. It bears emphasis, however, that the attorney general opinion addresses the statute before the 1976 amendment.

proprietary function paid for by user fees, and doing so is not in conflict with the general laws or the Constitution, the Court need look no further than section 50-301.

Hayden recognizes that this is cutting edge stuff. It does not appear that the question of whether section 50-301 extended home rule status has ever been presented to an appellate court. Then again, the statute seems mighty clear. That said, it is not necessary for the Court to find that cities have either limited or true home rule status—or even to address section 50-301. As shown above, there is ample other statutory authority—supported by settled case law—authorizing Hayden's cap fee.

II. HAYDEN IS ENTITLED TO AN AWARD OF ATTORNEY FEES

A. Hayden should have been awarded attorney fees below.

Hayden sought attorney fees below pursuant to Idaho R. Civ. P. 54 and Idaho Code §§ 12-117(1) and 12-117(2).[23] Hayden cross appealed the District Court's denial of that request.

Section 12-117(1) authorizes awards of attorney fees to the "prevailing party" when "the nonprevailing party acted without a reasonable basis in fact or law." Both determinations are committed to the discretion of the trial court and are reviewed under an abuse of discretion standard. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012) (J. Jones, J.). However, if those tests are met, the award is mandatory. *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 153 Idaho 114, 117, 279 P.3d 100, 103 (2012) (Burdick, C.J.).

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[23] Hayden could have requested attorney fees under Idaho Code § 12-121 as well. *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 155 Idaho 55, 67, 305 P.3d 499, 511 (2013) (Eismann, J.). However, this Court has equated the "reasonable basis" standard under section 12-117 and the "frivolous" standard under section 12-121. *Ada Cnty. Highway Dist. v. Total Success Investments, LLC*, 145 Idaho 360, 372, 179 P.3d 323, 335 (2008) ("Burdick, J."); *Jenkins v. Barsalou*, 145 Idaho 202, 207, 177 P.3d 949, 954 (2008) (Burdick, J.); *Nation v. State, Dep't of Correction*, 144 Idaho 177, 194, 158 P.3d 953, 970 (2007) (Burdick, J.). Likewise, the prevailing party provisions in both statutes are governed by the same Rule 54 provisions. Consequently, Hayden does not perceive that adding section 12-121 would contribute anything. If we have missed something here, Hayden throws itself on the mercy of the Court.

The District Court found that Hayden was the prevailing party but denied an award of attorney fees because it found that Builders acted with a reasonable basis in fact and law. *Decision on Fees* (R. Vol. 4, pp. 806-21). The District Court did not address Hayden's request, in the alternative, for a partial award of attorney fees under Idaho Code § 12-117(2).

(1) Hayden was the overall prevailing party.

It is rare for a litigant to win every issue, particularly in a case such as this calling into question numerous financial transactions over a number of years. Hayden would posit that a few inadvertent errors could be found in the accounting of every municipality, corporation, or home checkbook. The law is clear, however, that in determining who is the overall winner, the courts must take a broad view of what was at stake and what each side accomplished.

Idaho R. Civ. P. 54(d)(1)(B) provides clear guidance on the subject:

> (B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

In *Hobson Fabricating Corp. v. SE/Z Constr.*, LLC, 154 Idaho 45, 49, 294 P.3d 171, 175 (2012) (Burdick, C.J.), this Court reiterated that Rule 54 mandates an "overall view, not a claim-by-claim analysis." The Court concluded: "Therefore, the issue in this case is not who succeeded on more individual claims, but rather who succeeded on the main issue of the action based on the outcome of both the litigation and the settlement." *Id.* (emphasis supplied). The same analysis applies where, as here, the case was ultimately settled by stipulation. *Hobson*, 154

Idaho at 51, 294 P.3d at 177.[24]

Where a defendant succeeds in fending off a lawsuit, he or she is the prevailing party:

> In *Daisy Manufacturing Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 999 P.2d 914 (Ct. App. 2000), the Court of Appeals observed: "The 'result obtained' in this case was a dismissal of [plaintiff's] action with prejudice, the most favorable outcome that could possibly be achieved by [a defendant].

Shore, 146 Idaho at 915, 204 P.3d at 1126 (brackets original).

In some instances, there is no clear, overall winner. Where there is a true split decision—with each side scoring significant wins—neither side is a prevailing party for purposes of section 12-117. *Trilogy Network Systems, Inc. v. Johnson*, 144 Idaho 844, 172 P.3d 1119 (2007) ("Burdick, J."); *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 153 Idaho 114, 117, 279 P.3d 100, 103 (2012) (Burdick, C.J.). Such is not the case here. Builders lost on the main illegal tax issue, failed to prove any significant accounting issue, and stipulated away the rest.

It is not surprising that Builders agreed to dismiss the accounting issues. The "big" accounting issue—Builders' premise that Hayden was using cap fees to fund non-sewer programs—fizzled. The litigation did prompt Hayden to discover some minor accounting errors. But, as it turned out, the net effect of those errors actually favored Builders. Once Hayden corrected them, Builders were worse off than when they started.[25] Plainly, the District Court did not abuse its discretion in finding Hayden to be the overall prevailing party.

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[24]In the context of a stipulated settlement, the Court explained: "In litigation, avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff." *Straub v. Smith*, 145 Idaho 65, 72, 175 P.3d 754, 761 (2007) (Eismann, J., concurring) (quoting *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (J. Jones, J.)). The *Straub* case is not precisely on point because it dealt with a stipulation that completely dismissed the case. In our situation, Builders reserved the right to appeal the merits. However, the case is otherwise on all fours.

[25] Builders' abiding belief that Hayden was up to no good was not only unfounded but unfathomable. From the start, even before the lawsuit was filed, Hayden bent over backwards to work with Builders. From day one, Hayden opened its books to Builders' accountant. See footnote 4 at page 11. Of course, as public records, those books are open to everyone.

(2) Builders pursued this case without reasonable basis in fact or law.

This Court has held that a losing party cannot be said to have acted without reasonable basis when litigating an issue of first impression. *E.g.*, *Arambarri v. Armstrong*, 152 Idaho 734, 740-41, 274 P.3d 1249, 1255-56 (2012) (W. Jones, J.). But this is not such a case.

Builders asserted that "there is not one statute or Idaho appellate court decision that has dealt exclusively with whether municipalities may charge cap fees solely to fund future expansion projects." *Builders' Attorney Fee Opposition* at 4 (R. Vol. 4, p. 770). In fact, multiple statutes and five appellate decisions (*IBCA*, Kootenai Property Owners, *Brewster*, *Loomis*, and *Viking*) control the case.

The District Court carefully stepped through each of Builders' arguments, explaining why each was wrong:

- Both future expansion and replacement of existing capacity are authorized by Idaho Code § 63-1311. *Decision on Fees* at 11 (R. Vol. 4, p. 816).
- The District Court did not have to look to foreign decisions to support its holding. *Decision on Fees* at 11 (R. Vol. 4, p. 816).
- As for Idaho Code § 50-1030, "the issue being debated . . . was addressed by the Idaho Supreme Court in *Viking*." *Decision on Fees* at 11 (R. Vol. 4, p. 816).
- Both *Loomis* and *Viking* show that "funds from the capitalization fee [may be used] to construct, reconstruct, improve, better, or extend the system." *Decision on Fees* at 11-12 (R. Vol. 4, pp. 816-17).
- Whatever disputed issues of fact were present were resolved when "the parties eventually reached a stipulation regarding the City's expenditure of funds, and Plaintiffs [withdrew] with prejudice any claim relating to alleged accounting errors . . . ." *Decision on Fees* at 12 (R. Vol. 4, p. 817) (brackets original).

The District Court then concluded that this case was controlled by existing precedent and was not a question of first impression:

> As to the legal issues brought before the Court, the Court was able to reach its conclusion based upon existing Idaho statutory and case law that had previously addressed fees similar to the City's and that said law authorized the City to collect sewer capitalization fees as a matter of law.

Decision on Fees at 12-13 (R. Vol. 4, pp. 817-18).

Despite this finding, the District Court concluded in the next sentence that attorney fees should be denied because "the authority was not so clear as to preclude good faith litigation of the issue." *Decision on Fees* at 13 (R. Vol. 4, p. 818). This does not reconcile. If the decision was controlled by prior cases, then the outcome was clear. Essentially, the District Court said that it would let Builders off the hook. That was an abuse of discretion.

The District Court then turned to the disputed facts. Despite recognizing that these were all resolved by stipulation, the District Court concluded that their presence in the case meant that Builders acted with a reasonable basis. *Decision on Fees* at 13 (R. Vol. 4, p. 818). This, too, was an abuse of discretion. It is apparent from the *Phillips Affidavit* and the *Stipulation* that the accounting errors worked in Builders' favor and that their litigation worked against them.

(3) In the alternative, Hayden should be awarded partial attorney fees below.

Hayden sought attorney fees under both subsection (1) and, in the alternative, subsection (2). It provides:

> (2) If a party to a proceeding prevails on a portion of the case, and the state agency or political subdivision or the court hearing the proceeding, including on appeal, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

Idaho Code § 12-117(2). Even if the accounting issue kerfuffle means there was no overall winner, precluding an award under subsection (1), Hayden should at least have been awarded its fees on the illegal tax issue. The District Court did not address subsection (2).

Curiously, this provision has received scant attention in the appellate cases. The first case to address the subsection (2) is *Roe v. Harris*, 128 Idaho 569, 917 P.2d 403 (1996) (Johnson, J.). Consistent with the plain language of the statute, the *Roe* Court ruled that a litigant may lose a part of the case and still be entitled to an attorney fee award as to those issues on which he or she prevailed.

In *Roe*, pro-choice plaintiffs challenged the constitutionality of an anti-abortion statute and an anti-abortion rule. The district court upheld the statute (but based on an interpretation favorable to the plaintiffs) and struck down the rule. The Court found that the district court abused its discretion by failing to award plaintiffs attorney fees for the portion of the case they won pursuant to Idaho Code § 12-117(2).

Thus, under *Roe*, if the Court determines that Hayden is not entitled to attorney fees with respect to the accounting issues, it is nonetheless entitled to fees as to the main part of the case—that is, its authority to impose a cap fee based on replacement cost—if Builders pursued that part frivolously. This result follows from the statute itself which calls for an award where the Court "finds that the nonprevailing party [Builders] acted without a reasonable basis in fact or law with respect to that portion of the case" on which Hayden prevailed. Idaho Code § 12-117(2).

The Court briefly referenced the statute in *Nelson v. Big Lost River Irrigation Dist.*, 133 Idaho 139, 143, 983 P.2d 212, 216 (1999) (Kidwell, J.). In that case, the Court upheld the district court's award of partial attorney fees to each party under Idaho Code § 12-117(2). In so holding, the *Nelson* Court referenced its decision in *Prouse v. Ransom*, 117 Idaho 734, 791 P.2d

1313 (Ct. App. 1989) (Burnett, J.) (upholding a split award on the basis of Idaho R. Civ. P. 54(d)(1)).

In *Hobson Fabricating Corp. v. SE/Z Constr.*, LLC, 154 Idaho 45, 49-51, 294 P.3d 171, 175-77 (2012) (Burdick, C.J.), the Court upheld the district court's finding that the parties seeking attorney fees were not the "overall prevailing party" and thus not entitled to attorney fees under Idaho Code § 12-117(1). On appeal, those parties argued, in the alternative, that they were at least entitled to partial recovery of attorney fees under Idaho Code § 12-117(2). The Court said, in essence, "Too bad, you should have raised it below."[26] Thus, the *Hobson* Court rejected the 12-117(2) argument on technical pleading grounds. Its ruling did nothing to disturb or question the holding in *Roe* that partially prevailing parties may be entitled, at least, to partial awards.

In conclusion, if the Court finds that Hayden is not entitled to an award of all its fees under subsection (1), Hayden is entitled, at the very least, to a partial award as to those issues on which it prevailed and as to which Builders' position was not reasonable.

B. Hayden is entitled to an award of attorney fees on appeal.

(1) Builders' appeal was pursued without a reasonable basis in fact or law.

Idaho Code § 12-117 applies on appeal as well as below. "The Court employs a two-part test for I.C. § 12-117 on appeal: the party seeking fees must be the prevailing party and the losing party must have acted without a reasonable basis in fact or law." *City of Osburn v. Randel*, 152 Idaho 906, 910, 277 P.3d 353, 357 (2012) (J. Jones, J.). For all of the reasons stated

[26] "In this case, the Contractors failed to adequately describe that the basis of the award they were pursuing was centered on I.C. § 12-117(2), and they did not cite to any case where an award of attorney fees was made pursuant to I.C. § 12-117(2). . . . Because the Contractors did not properly present a request pursuant to I.C. § 12-117(2) below, they are not allowed to pursue that request on appeal." *Hobson*, 154 Idaho at 52-53, 294 P.3d 171, 178-79.

above, Hayden satisfies these tests and should be awarded attorney fees on appeal.

Even if this Court were to affirm the denial of fees below, the Court, in its discretion, may determine that fees are appropriate on appeal. These are matters of discretion, and this Court must reach its own conclusion as to whether Builders had a reasonable basis to pursue the appeal. For instance, in *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.), this Court awarded attorney fees on appeal notwithstanding the district court's denial of attorney fees below.

It appears that the trial court cut Builders some slack in reaching its conclusion that their litigation was not frivolous. But Builders now have the benefit of the teaching of the District Court which addressed and explained with great clarity why each of the arguments that Builders continue to pursue on appeal is wrong. At some point, litigants are expected to learn from the process of litigation.[27] Even if filing the complaint was reasonable, pursing this appeal was not. What this Court said in 2005 applies equally here:

> Although the Castrignos may have had a good faith basis to bring the original suit based on their interpretation of Idaho law, the Castrignos . . . were clearly advised on the applicable law in an articulate and well reasoned written decision from the district court. Nevertheless, the Castrignos chose to further appeal that decision to this Court, even though they failed to add any new analysis or authority to the issues raised below.

Castrigno v. McQuade, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005) (Trout, J.).

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[27] For example, the District Court explained, "The *Loomis* court expressly abstained from addressing the particular issue being addressed in the present case, which is whether the use of fees to pay for future expansion is permissible under the Idaho Revenue Bond Act. Id. at 439, 808 P.2d at 1278 (see FN3)." *Decision on MSJ* at 18 (R. Vol. 3, p. 651). Hayden repeatedly made this same point about footnote 3 in its briefing. *Hayden's MSJ Brief* at 27 (R. Vol. 1, p. 97); *Hayden's Reply #2* at 15 (R. Vol. 3, p. 620); *Hayden's Attorney Fee Memo* at 22 (R. Vol. 3, p. 741). One would expect the Builders, at some point, to catch on to this footnote. Instead, in their latest brief, Builders conclude their discussion of *Loomis* with this explanation of why the cap fee fails the *Loomis* test: "Its sole purpose is to raise revenue for the future expansion of Respondent's sewer system." *Appellants' Brief* at 7. Builders should know by now that *Loomis* did not address the question of whether user fees may be used to raise revenue to fund future expansion.

(2) If Hayden prevails on the appeal but not its cross appeal, it is still entitled to some or all attorney fees.

(a) Hayden would still be the overall prevailing party on appeal.

If Hayden were to prevail on Builders' appeal, but lose its cross appeal on attorney fees, Hayden contends that it would still be the overall prevailing party, because the attorney fee issue is a minor, collateral issue compared to the merits. Hayden acknowledges, however, that this Court seems to have adopted a contrary rule-of-thumb whereby if a party loses any aspect of an appeal it can never be a prevailing party on appeal.[28] Accordingly, Hayden approaches this issue with trepidation, aware that bringing a cross appeal might cause it to forfeit an award of attorney fees on appeal.

Curiously, despite the number of occasions on which the Court has summarily denied attorney fees on appeal (see footnote 28), it does not appear that anyone has ever brought this issue to the Court's attention. In doing so today, Hayden urges the Court to take a hard look at this *per se* rule. It is not fair, it is contrary to the goals of the attorney fee statutes, and it cannot be reconciled with the plain language of the attorney fee statues or Idaho R. Civ. P. 54(d)(1)(B).

Nor is it consistent with other precedents of this Court, which make clear that in district court a holistic approach is employed to determine who is the prevailing party. For example:

> "In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed 'in the action.' That is, the prevailing

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[28] *Hoskins v. Circle A Constr., Inc.*, 138 Idaho 336, 63 P.3d 462 (2003) (Schroeder, J.); *Keller v. Inland Metals All Weather Conditioning, Inc.*, 139 Idaho 233, 241, 76 P.3d 977, 985 (2003) (Eismann, J.); *KEB Enterprises, L.P. v. Smedley*, 101 P.3d 690, 699, 140 Idaho 746, 755 (2004) (Eismann, J.); *Total Success Investments, LLC v. Ada Cnty. Highway Dist.*, 148 Idaho 688, 696, 227 P.3d 942, 950 (Ct. App. 2010); *Tapadeera, LLC v. Knowlton*, 153 Idaho 182, 189, 280 P.3d 685, 692 (2012) (Eismann, J.); *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 23, 278 P.3d 415, 415 (2012) (Horton, J.); *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 498, 300 P.3d 18, 30 (2013) (J. Jones, J.); *Hehr v. City of McCall*, 155 Idaho 92, 97, 305 P.3d 536, 543 (2013) (Burdick, C.J.); *Sanders v. Bd. of Trustees of Mtn. Home School Dist. No. 193*, 2013 WL 1349418 (Idaho Apr. 7, 2014) (Burdick, C.J.).

> party question is examined and determined from an overall view, not a claim-by-claim analysis."

Advanced Medical Diagnostics, LLC v. Imaging Center of Idaho, LLC, 154 Idaho 812, 814, 303 P.3d 171, 173 (2013) (Eismann, J.) (quoting *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (J. Jones, J.)). The same is true in administrative proceedings.[29] It is difficult to see why it would be any different on appeal.

Moreover, Idaho Code § 12-117(1) was amended in 2012 to expressly provide that it apply to appeals. 2012 Idaho Sess. Laws ch. 149. It seems implausible that the Legislature intended that the same statutory language would apply one way here and another way below. Surely the Legislature would have expected that the "overall view" approach mandated by Rule 54 and applied by this Court to lower courts and administrative agencies would be applied identically on appeal. Thus, to paraphrase this Court's rejection of a "claim-by-claim analysis," where there are appeals and cross appeals, should not the Court determine who prevailed overall, not on an appeal-by-appeal basis?

It would seem that this Court's embrace of a *per se* rule prohibiting fees whenever a party loses a cross appeal has evolved accidentally. For example, *Hoskins*, *Keller*, and *Tapadeera* (see footnote 28 above) are classic split decisions in which each party won a substantial part and lost a substantial part on appeal. In other words, there was no obvious winner, and it is easy to see why attorney fees were not awarded to either party on appeal.

Hoskins involved dueling appeals and cross-appeals, both of which raised significant substantive issues. Hoskins won one and lost the other. They canceled out, so he was not the

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[29] In 2012, this Court noted: "This Court can discern no basis for applying a differing standard to the determination of prevailing party status in an administrative proceeding." *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 153 Idaho 114, 118, 279 P.3d 100, 104 (2012) (Burdick, C.J.). If the same standard applies in an administrative proceeding and at trial, it is not apparent why a different standard would apply on appeal.

prevailing party. *Hoskins*, 138 Idaho at 343, 63 P.3d at 469.

Keller was a contract damages case involving a defective dehumidifier. The trial court awarded damages of $13,452 and attorney fees of $74,400. The defendant appealed. This Court slashed most of the damage award—cutting it to $2,793—but left the attorney fee award in place. That makes it hard to say who the winner was. The Court concluded: "Because both parties have prevailed in part on appeal, we will not award attorney fees on appeal." *Keller*, 139 Idaho at 241, 76 P.3d at 985.

Tapadeera also involved offsetting wins and losses. In the district court, Tapadeera obtained a judgment against the defendants for $23,421, but lost its request for attorney fees in the amount of $22,666. *Tapadeera*, 153 Idaho at 185-86, 280 P.3d at 688-89. Both sides appealed, and this Court affirmed on both scores, resulting in a wash. The Court concluded, simply: "[Tapadera] prevailed on the Knowltons' appeal but lost its cross-appeal. Therefore, Tapadeera is not the prevailing party on appeal and is not entitled to an award of attorney fees under Idaho Code section 12-121." *Tapadeera*, 153 Idaho at 189, 280 P.3d at 692.

If Hayden were to prevail on Builders' appeal—protecting tens of millions of dollars worth of sewer improvements[30] and establishing a precedent that will have even greater impact[31]—and lose its cross-appeal worth $221,543 in attorney fees, that is not a wash and it does not follow from *Tapadeera, Keller, or Hoskins* that Hayden is not the prevailing party.

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[30] The District Court observed in its *Decision on MSJ* at 4 (R. Vol. 3, p. 637) that more than $10 million has been spent or budgeted for sewer system expansion projects from 2005 through 2014. The fee at issue was calculated based upon the estimated cost of build out of the system at a total of more than $20 million. *Welch Comer Report*, pp. 35-36 (A.R. pp. 41-42).

[31] Frankly, the millions of dollars at stake in this case pale in comparison to what was coming next. Should Builders prevail in their challenge to Hayden's cap fee, the HARSB cap fee undoubtedly would be challenged next. See *Chatwin Affidavit #1* (R. Vol. 1, at p. 112).

Yet *Tapadeera, Keller, or Hoskins* are now cited routinely without analysis. The result is that the sensible outcome in those cases has morphed into a wooden rule-of-thumb in which the big picture is of no consequence and any loss on appeal bars an award of attorney fees.[32]

Hayden urges the Court to reconsider this approach. As the Court said in *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 155 Idaho 55, 68, 305 P.3d 499, 512 (2013) (Eismann, J.), "That holding has been followed in subsequent cases, but it is incorrect."

Here, the attorney fee issue pales into insignificance compared to the importance of the precedent set on the main issue. (See footnotes 30 and 31 at page 46.) As this Court once observed: "Furthermore, we have said costs and attorney fees are collateral issues which do not go to the merits of an action . . . ." *Straub v. Smith*, 145 Idaho 65, 69, 175 P.3d 754, 758 (2007) (Burdick, J.). Admittedly, that observation was made in another context. But it would seem to reinforce the intuitive idea that party who wins the merits but fails to win reversal of a comparatively small attorney fee denial is still the overall prevailing party. To be sure, it is quite another thing where the attorney fees equal (as in *Tapadeera*) or substantially exceed (as in *Keller*) the value of a case. But where, as here, the attorney fees are the tail on the dog, the dog may still prevail despite the loss of its tail.

(b) At a minimum, Hayden is entitled to fees on the appeal it wins.

In any event, none of the cases applying the *per se* rule addressed Idaho Code § 12-117(2). For the reasons discussed above in section II.A(3) at page 40, if Hayden prevails on the merits, it is entitled, at the very least, to an award of partial attorney fees on appeal.

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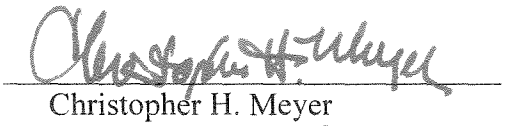
[32] For example, in *Hurtado* the Court said flatly, "Where both parties prevail in part on appeal, this Court does not award attorney fees to either party." *Hurtado*, 153 Idaho at 23, 278 P.3d at 425. Both *Keller* and *Hurtado* involved only Idaho Code § 12-120(3). However, *Hurtado* (which cited *Keller*) was cited in *Sanders* involving section 12–117 and 12-120(3).

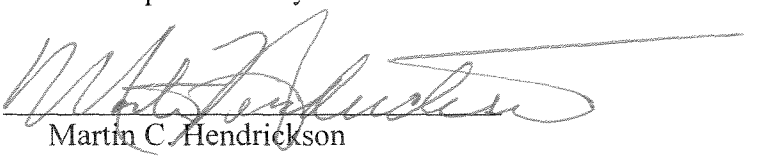
CONCLUSION

This Court ruled in *Viking*, 149 Idaho at 194, 233 P.3d at 125, that user fees may be based on "the value of that portion of the system capacity that the new user will utilize" and that the value may be calculated based on "replacement cost rather than historical cost." The Court then rejected Viking's argument that fees cannot be used "to pay for future capital assets and future improvements required due to population growth." *Viking*, 149 Idaho at 196, 233 P.3d at 127. In keeping with the Court's guidance, Hayden retained an engineering firm to carefully calibrate the fee to ensure that it would be just enough to allow the City to stay a step ahead of development, by charging the new user what it costs the City to replace the capacity consumed. Having adhered to this Court's mandate, and for all the other reasons discussed above, Hayden urges that the District Court's decision be affirmed as to the merits, and that attorney fees be granted below and on appeal.

Respectfully submitted on May 19, 2014.

GIVENS PURSLEY LLP

By 
Christopher H. Meyer

By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 19, 2014 the foregoing was served as follows:

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Christopher H. Meyer

board, as provided by chapter 19, title 54, Idaho Code; Idaho real estate ~~board~~ [commission], as provided by chapter 20, title 54, Idaho Code; board of social work examiners as provided by chapter 32, title 54, Idaho Code, and the board of veterinary medicine, as provided by chapter 21, title 54, Idaho Code; and,

(3) The bureau of occupational licenses is hereby created within the department of self-governing agencies.

Approved March 19, 1976.

CHAPTER 214

(H.B. No. 422)

AN ACT

RELATING TO SELF-GOVERNING POWERS OF CITIES; AMENDING SECTION 50-301, IDAHO CODE, TO PROVIDE THAT CITIES MAY EXERCISE AND PERFORM ALL FUNCTIONS OF LOCAL SELF-GOVERNMENT NOT PROHIBITED BY LAW OR BY THE CONSTITUTION.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 50-301, Idaho Code, be, and the same is hereby amended to read as follows:

50-301. CORPORATE AND LOCAL SELF-GOVERNMENT POWERS. Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; and exercise ~~such other powers as may be conferred by law~~ all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.

Approved March 22, 1976.

1976

HOUSE

STATEMENTS OF PURPOSE
for

House Bills
House Concurrent Resolutions
House Joint Memorials
House Joint Resolutions
House Resolutions

2nd Regular Session
43rd Idaho Legislature

Suite

683

STATEMENT OF PURPOSE
RS 685

The purpose of this bill is to grant a limited form of local self-government authority to Idaho's cities. Currently, Idaho's cities may exercise only those powers and perform only those functions specifically mentioned in the Constitution of the State of Idaho or in the Idaho Code. If the Constitution and the Code are silent, cities may not act. Unlike the state government, which may exercise any power and perform any function not prohibited by the United States Constitution, Idaho's cities do not have "residual powers." They may act only if they have been specifically authorized to act---and only in the manner prescribed by the Idaho Constitution or the Idaho Code.

Enactment of this bill would provide Idaho's cities with real local control over local affairs by permitting them to exercise those powers and perform those functions not specifically prohibited by or in conflict with the Idaho Constitution or the Idaho Code. Because the Idaho Code is presently so restrictive, the immediate impact of the enactment of this bill would not be great. It would, however, establish a general framework upon which meaningful local self-government could be constructed over a period of time.

FISCAL NOTE

There will be a fiscal impact but it cannot be estimated.

STATEMENT OF PURPOSE/FISCAL NOTE H BILL NO. 422

1976

HOUSE LOCAL GOVERNMENT COMMITTEE

MINUTES

2nd Regular Session
43rd Idaho Legislature

LOCAL GOVERNMENT COMMITTEE

MINUTES

TIME: 1:30 P.M.

PLACE: Room 416, STATEHOUSE

DATE: January 20, 1976

PRESENT: Onweiler, Neider, Ingram, Wheeler, Bunting, Munger, Stivers, Swisher, Harlow, Twilegar Abbott, Hosack.

ABSENT: None.

GUESTS: Barbera Dyer of the League of Women Voters; Ms. Southwick of the Idaho Free Press, Bob Leeright of AP, Gilliland, Statesman; Weatherby and Decker of Association of Idaho Cities, Dick Hronek; Marj Jonasson Ada County Treasurer.

The meeting was called to order by Chairman Onweiler at 1:30 p.m.

There was considerable discussion as to whether to continue the meetings at 1:30 in the afternoon or convene at 2 o'clock instead. It was agreed to continue at 1:30 until such time it will be impossible to gather at that time.

MOTION: Motion was made by Representative Swisher to approve the minutes of the January 12 and January 16 meetings; Seconded by Munger.

MOTION CARRIED.

RS 699 : This RS brought by Representative Wheeler relates to change of the fiscal years of the cities and counties in the State from the calendar years to October 1 through September 30 so that property taxes are budgeted and levied in the same year they are received. Mr. Weatherby explained considerably with regard to this legislation.

MOTION: Motion was made by Representative Stivers for introduction of the bill; seconded by Wheeler.

MOTION CARRIED - No opposed.

HB 350 Brought by Representative Jackson. Bill was discussed by Bill Lee the attorney who prepared the legislation. Relates to criminal trespass laws.

MOTION: Motion made by Representative Stivers to "Do pass" Seconded by Representative Swisher.

MOTION CARRIED.

HB 361 Companion bill to HB 350 brought by Representative Jackson. Relates to civil trespass laws.

MOTION: Motion made by Representative Stivers that HB 361 Do Pass; Seconded by Representative Swisher.

MOTION CARRIED.

MINUTES Cont'd - January 20, 1976

RS 685 — Brought by Representative Swisher - to grant limited form of local self-government authority to Idaho's cities, amending section 50-301 to provide that cities may exercise and perform all functions of local self government.

MOTION: Motion by Representative Swisher to introduce RS 685, with a change in the fiscal note, showing that there would be fiscal impact but it cannot be estimated; Seconded by Twilegar.

MOTION CARRIED..

RS 660 — By Onweiler - RS 660 sets requirements for the distribution of irrigation water within irrigation districts.

MOTION: Representative Swisher moved for introduction of RS 660; Seconded by Representative Munger.

MOTION CARRIED.

RS 661 — By Onweiler - RS 661 provides that counties may create local improvement districts for the construction of irrigation systems. No tracts of five acres or more shall be included in LID.

MOTION: Representative Swisher moved for introduction of RS 661; seconded by Munger.

MOTION CARRIED.

RS 694 — By Rep. Little - Amends Section 16-1820 by striking the requirement that selection and compensation of county probation officers shall be done in accordance with the provisions of the Merit System.

MOTION: Motion made by Representative Munger to introduce RS 694; seconded by Ingram.

Motion opposed by Swisher.
MOTION CARRIED by majority.

RS 669; — By Representative Wheeler relates to the purposes of local planning; amending sec. 67-6502 to provide that protection against noise pollution shall be within conditions considered as promotion of health; safety and general welfare.

MOTION: Motion made by Representative Wheeler to introduce RS 669; seconded by Representative Harlow.

MOTION CARRIED.

RS 695 — Honae Memorial brought by Representative Hosack. This memorial communicates the sense of the forty-third Idaho Legislature that federal revenue sharing program has been valuable to the state and urges continuation of the program.

MOTION: Representative Hosack moved that RS 695 be introduced; seconded by Twilegar.

IN FAVOR - Wheeler, Bunting, Swisher, Harlow, Twilegar, Abbott, Hosack,

OPPOSED - Onweiler, Neider, Ingram, Munger, Stivers.

MOTION CARRIED.

ADJOURNMENT - 3 P.M.

Chairman

Secretary

LOCAL GOVERNMENT COMMITTEE

MINUTES

TIME: 1:30 P.M.

PLACE: Room 416, STATEHOUSE

DATE: January 16, 1976

PRESENT: Onweiler, Ingram, Wheeler, Munger, Stivers, Swisher, Twilogar, Abbott, Hosack.

ABSENT: Neider, Bunting, Harlow.

The meeting was called to order by Chairman Onweiler.

RS 510 Requires all members of Boards of County Commissioners and city councils to vote on all questions put, amending Section 50-705 -- brought by Scoresby.

MOTION: Motion made by Representative Swisher that RS 510 not be introduced and returned to the sponsor; Seconded by Representative Munger.

MOTION CARRIED.

HB 362 Relating to county financial assistance to soil conservation districts, amending Sec. 22-2726 to Strike references to clerical assistance.

MOTION: Motion made by Representative Swisher to move it to the floor to be placed on General Orders for consideration and amendment. Seconded by Twilegar. (to be carried by Munger)

MOTION CARRIED:

HB 372 RS 629 brought by Representative Hollifield would repeal that section of Idaho Code which requires the various counties to provide adequate quarters for the personnel of the Department of Health and Welfare. Now HB 372.

MOTION: Motion made by Representative Abbott that the bill be put on the floor with do pass. Seconded by Representative Stivers. (Hollifield to carry)

MOTION CARRIED.

HB 360 Providing that drafting Mylar may be used for plats offered for record. (Stivers to carry.)

MOTION: Motion made by Representative Swisher that HB 360 be sent to the desk with a do pass. Seconded by Ingram . (Stivers to carry)

MOTION CARRIED.

RS 685 Relating to self-governing powers of cities; amending section 50-301 to provide that cities may exercise and perform all functions of local self-government.

MOTION: Motion made by Representative Munger to hold RS 685 until the next committee meeting. Seconded by Representative Wheeler.

MOTION CARRIED.

ADJOURNMENT: Meeting adjourned at 2 p.m.

Chairman Secretary

LOCAL GOVERNMENT COMMITTEE

MINUTES

TIME: 1:30 P.M. - JANUARY 28, 1976

PLACE: ROOM 416, STATEHOUSE

PRESENT: Onweiler, Mrs. Neider, Ingram, Wheeler, Bunting, Munger, Stivers, Swisher, Harlow, Twilegar, Abbott, Hosack.

GUESTS: Dean Huntsman, Max Yost, Floyd Decker, Russell Bishop, Eddie Blinko, Peter B. Wilson, Mayor Johnson of Rupert, Elmer Shank, Gordon Thatcher, Bob Leeright of AP, Richard Charnock of UP, Bert Martin representing Utah & Idaho Power.

Meeting was called to order by Chairman Onweiler at 1:36 p.m.

MOTION: Motion made by Representative Swisher to approve the minutes of the January 26, 1976 Local Government Committee meeting; seconded by Ingram.

MOTION CARRIED.

RS 682 By Davidson -- relating to electric service furnished by cities; amending Ch. 3, Title 61 by adding a new section - 61-333D, providing method of compensation to cooperative.

Messrs. Floyd Decker, Peter B. Wilson, Mayors Johnson and Shank discussed the merits of the bill at some length and Mr. Gordon Thatcher, Attorney for the Idaho Cooperative Utilities Association gave a lengthy speech against the legislation.

MOTION: Motion was made by Representative Abbott to Table the bill; seconded by Representative Munger.

AYES: Neider, Ingram, Bunting, Munger, Stivers, Harlow, Twilegar, Abbott, Hosack.

NAYS: Wheeler, Swisher.

MOTION CARRIED.

RS 853 By Twilegar - Concurrent Resolution providing a statement of legislative findings regarding the "1902" portion of St. Alphonsus.

MOTION: Motion made by Representative Stivers to introduce this Resolution; seconded by Harlow.

MOTION CARRIED.

HB 420 By Wheeler - To change fiscal year of cities and counties to October 1 through September 30.

Chairman Onweiler suggested that this bill be postponed until 2'oclock on Monday, February 2, giving everyone an opportunity to consider it more fully.

All agreed to this suggestion.

HB 421 — By Little - Amending Sec. 16-1920 striking requirement that selection and compensation of county probation officers shall be done in accordance with the provisions of the State Merit System.

MOTION: Motion made by Representative Swisher that the bill "do pass." Seconded by Representative Munger.

MOTION CARRIED.

HB 422 - By Swisher - All agreed that this bill should be considered at 2 p.m. on Wednesday, February 4, 1976, giving all a better chance to consider it. This bill relates to local self-government.

HJM 12 — By Hosack - Memorial that federal revenue sharing program has been valuable to state and urges continuation.

MOTION: A motion was made by Hosack that this HJM "do pass," and seconded by Abbott.

After comments by Stivers and Ingram that it should not pass, Swisher made a substitute Motion - that the Memorial be sent to the desk without recommendation. Munger Seconded this Motion.

Motion by Swisher Carried.

HB 417 - By Onweiler - Provides that counties may create local improvement districts for construction of irrigation systems. No tract of five acres or more shall be included in LID.

MOTION: Motion by Swisher that HB 417 be sent to the desk with "Do Pass." Seconded by Hosack.

MOTION CARRIED.

Proposed legislation was submitted to the Committee from the Sheriffs of Ada and Canyon Counties to upgrade and professionalize the office of the County Sheriff on a statewide basis by providing rules for the election of, and minimum standards for, such office.

Sheriff Nourse of Canyon County discussed the merits of this legislation. There was opposition to this by members of the Committee.

MOTION: Motion made by Representative Ingram that the bill be returned to the sponsor; Seconded by Representative Twilegar.

MOTION CARRIED.

MEETING ADJOURNED AT 3:10 p.m.

Chairman

Secretary

LOCAL GOVERNMENT COMMITTEE

M I N U T E S

TIME: 2 P.M. Wednesday, February 4, 1976.

PLACE: ROOM 416 STATEHOUSE

PRESENT: Onweiler, Ingram, Wheeler, Bunting, Munger, Stivers, Swisher, Harlow, Abbott, Hosack.

ABSENT: Twilegar.

GUESTS: Jean Uranga, Attorney General's Office; Barbara Dyer, LWV, Boise; Jim Weatherby, Association of Idaho Cities; J. Webb, Association of Idaho Cities; Floyd A. Decker, Association of Idaho Cities, Jeff Seward, KAID-TV; Roger Snider, U of I, B.P.A.R.; Donna Boe, Pocatello City Council; Ann Hansen, LWV; Jean Langrill LWVI; Dean Huntsman, IACC; Arthur L. Smith, City Attorney, Idaho Falls.

Meeting was called to order at 2:10 p.m. by Chairman Onweiler.

HB 422 Jean Uranga of the Attorney General's Office presented an opinion from that office and a summary of the questions presented, analysis and conclusions. Copies of the opinion, No. 76-3, were made available to the members of the committee.

Mr. Arthur Smith, City Attorney for Idaho Falls, spoke in favor of the bill, explaining his views on matters of local concern in Idaho Falls. Jay Webb spoke in favor of the Bill for the Association of Idaho Cities; Donna Boe, Pocatello City Council also spoke in favor of the bill; Floyd Decker, Jim Weatherby also spoke in favor of the bill.

MOTION: Motion made by Representative Ingram to hold the Bill in committee for further consideration; Seconded by Representative Swisher.

MOTION CARRIED.

RS 852 Submitted by Little for the counties -- RS 852 would amend Section 25-2801 to give the county commissioners the authority to provide for a county dog license tax.

MOTION: Motion made by Representative Wheeler that RS 852 be referred for printing; seconded by Representative Swisher.

MOTION CARRIED.

RS 863 By Wheeler - Granting authority to make payroll deductions for any purpose approved by city council upon written approval by individual employee. (amends Sec. 50-1016)

MOTION: Motion made by Representative Swisher to introduce RS 863; Seconded by Representative Abbott.

MOTION CARRIED - (Stivers voting "No.")

RS 864 By Wheeler - relating to audits of city finances; amending Sec. 50-1010 to provide annual audits.

MOTION: Motion made by Representative Swisher that this RS be held for further study; Motion seconded by Harlow.

MOTION CARRIED.

3:45 p.m. Motion was made by Representative Bunting to adjourn; Seconded by Ingram.

MOTION FAILED.

MOTION: Motion made by Representative Munger to appoint a sub-committee to study the following RS numbers - RS 864, 865, 866, 867, 868, 869, 870, 871, 872, and 873; Seconded by Stivers, which will then be brought to the committee for further consideration. (Subcommittee members - Wheeler, Chair.; Munger & Hosack) MOTION CARRIED.

ADJOURNMENT: Motion made by Wheeler, to Adjourn; Seconded by Stivers.

MOTION CARRIED.
Meeting adjourned at 4:00 p.m.

Chairman Secretary

LOCAL GOVERNMENT COMMITTEE

M I N U T E S

TIME: TUESDAY, FEBRUARY 24, 1976.

PRESENT: Onweiler, Neider, Ingram, Wheeler, Bunting, Munger, Stivers, Swisher, Harlow, Twilegar, Hosack.

ABSENT: Abbott.

GUESTS: Sam Grayson, UPRR; H. A. McMurray, United Transportation Union; Lee Raymond, United Transportation Union; James B. Barham, Self; E.L. Butler, UPRR, Special Agent; Jim Weatherby, Association of Idaho Cities.

Meeting called to order by Chairman Onweiler at 3:00 P.M.

MOTION: Motion made by Representative Swisher that the minutes of the February 20, 1976 be approved; seconded by Representative Neider.

MOTION CARRIED.

HB 636 By Munger - Relating to jurisdiction on placement of stop signs at railroad crossings.

Mr.Grayson of the Union Pacific Railroad Company spoke with regard to this proposed legislation, opposing its passage. He states that the law as it is now on the books is a good law and does not recommend that it be changed. Mr. McMurray also spoke, giving his reasons for opposition to this bill. He presented figures supporting his views, copies of which are attached. Messrs. Barham and Raymond also expressed their views against the proposed legislation.

MOTION: Motion made by Representative Stivers that HB 636 be held for further study; seconded by Representative Ingram.

MOTION CARRIED.

HB 422 By Swisher - Relating to self-governing powers of cities.

MOTION: Representative Ingram moved that HB 422 be sent to the desk with a "do pass" recommendation; seconded by Representative Swisher.

MOTION CARRIED.

HB 644 By Harlow - to provide the Board of County Commissioners of a county may convey real property owned by county to local historical society.

MOTION: Representative Wheeler moved that HB 644 be sent to the desk with "do pass" recommendation; Seconded by Harlow.

MOTION CARRIED.

MINUTES - FEBRUARY 24, 1976

HB 638 By Onweiler - relating to taxing districts within cities; and adding new section to provide new taxing districts within cities.

MOTION: Representative Swisher moved that HB 638 be sent to desk with "do pass" recommendation; seconded by Representative Wheeler.

SUBSTITUTE MOTION Representative Munger made a substitute motion that HB 638 be sent to the desk without recommendation; Seconded by Hosack.

MOTION CARRIED.

HB 637 By Gines - This bill would remove the irrigation companies' power to place a lien on properties not having water delivery available to them.

Representative Gines explained this bill and answered questions presented by members of the committee.

MOTION: Representative Munger moved that HB 637 be held until the next meeting of the Local Government Committee, Thursday, February 26; seconded by Representative Swisher.

MOTION CARRIED.

MEETING ADJOURNED at 4:45 P.M.

Chairman

Secretary

1976

HOUSE PRINTING AND LEGISLATIVE EXPENSE COMMITTEE

MINUTES

2nd Regular Session
43rd Idaho Legislature

HOUSE PRINTING & LEGISLATIVE EXPENSE COMMITTEE

FORTY-THIRD LEGISLATURE - Second Session

The Printing Committee met in Room 311 at 2:00 PM on January 21, 1976.

PRESENT: All Members

MOTION: Mr. Johnson moved that the previous minutes be approved, seconded by Mr. Brooks. The motion was carried.

The Chairman reported that he had met with Senator Barker yesterday to discuss printing bills with a NEW SECTION. The method used now when adding a new section to an existing law is to print NEW SECTION and underline the added section. The Senate feels that it is unnecessary to underline the new section. It was the concurrence of the committee that the bills should be continued to be printed with underline of new sections.

MOTION: Mr. Swisher moved that the Printing Committee go on record of following existing printing methods of underlining, seconded by Mr. Hale. The motion was carried.

There was discussion that all new material was not underlined in a bill. Mr. Hosack cited H 418 as an example, stating that it was an entirely new section.

HJM 12, RELATING TO THE REENACTMENT OF FEDERAL REVENUE SHARING, was presented by Mr. Munger.

MOTION: Mr. Munger moved that HJM 12 be printed,
HJM 12 seconded by Mr. Hosack. The motion was carried.

H 407, RELATING TO THE HEAD TAX, REPEALING SECTIONS 57-1110, 63-3082, 63-3083, 63-3084, 63-3085 AND 63-3086, IDAHO CODE, was presented by Mr. Brooks.

MOTION: Mr. Brooks moved that H 407 be printed,
H 407 seconded by Mr. Hale. The motion was carried.

H 408, RELATING TO THE DISBURSEMENT OF A PORTION OF THE MINERAL LEASING ROYALTIES TO COUNTIES IMPACTED BY EXTRACTION OF MINERALS, was presented by Mr. Swisher.

MOTION: Mr. Swisher moved that H 408 be printed,
H 408 seconded by Mr. Brooks. The motion was carried.

H 409, PROVIDING FOR THE ORGANIZATION OF THE DEPARTMENT OF REVENUE AND TAXATION, was presented by Mr. Harlow.

MOTION: Mr. Harlow moved that H 409 be printed,
H 409 seconded by Mr. Swisher. The motion was carried.

H 410, RELATING TO THE STATE TAX COMMISSION; AMENDING SECTION 63-501, IDAHO CODE, BY STRIKING CERTAIN POWERS OF THE STATE TAX COMMISSION; AND AMENDING SECTION 63-506, IDAHO CODE, BY PROVIDING FOR APPOINTMENT OF A CHAIRMAN OF THE TAX COMMISSION BY THE GOVERNOR AND STRIKING CERTAIN POWERS OF THE TAX COMMISSION AND TRANSFERRING THOSE POWERS TO THE CHAIRMAN OF SAID COMMISSION, was presented by Mr. Munger. It was stated that H 410 was a Governor's bill.

MOTION: Mr. Munger moved that H 410 be printed,
H 410 seconded by Mr. Swisher. The motion was carried with Mr. Brooks voting 'nay.'

H 411, RELATING TO THE ALCOHOLISM AND INTOXICATION TREATMENT ACT, was presented by Mr. Wheeler.

MOTION: Mrs. Bunting moved that H 411 be printed,
H 411 seconded by Mr. Hale. The motion was carried.

H 412, RELATING TO LICENSING OF DRIVERS; AMENDING SECTION 49-316, IDAHO CODE, PROVIDING FOR DEMONSTRATION OF ABILITY TO EXERCISE ORDINARY AND REASONABLE CONTROL OF A MOTOR VEHICLE TO BE AT THE DISCRETION OF THE EXAMINER, was presented by Mr. Hale.

MOTION: Mr. Hale moved that H 412 be printed,
H 412 seconded by Mr. Hosack. The motion was carried.

H 413, RELATING TO FEES PAID FOR MOTOR VEHICLE TRIP PERMITS; AMENDING SECTION 49-120, IDAHO CODE, TO INCREASE NONRESIDENT 96 HOUR TRIP PERMIT FEES TO REFLECT INCREASED SIZES AND WEIGHTS, was presented by Mr. Hale.

MOTION: Mr. Hale moved that H 413 be printed,
H 413 seconded by Mr. Swisher. The motion was carried.

H 414, RELATING TO THE REVOCATION AND SUSPENSION OF DRIVERS' LICENSES; AMENDING SECTION 49-330, IDAHO CODE, BY DEFINING THE TERM "VIOLATION" TO MEAN FINAL CONVICTION ON A CHARGE INVOLVING A MOVING TRAFFIC VIOLATION, was presented by Mr. Hale.

MOTION: Mr. Hale moved that H 414 be printed,
H 414 seconded by Mr. Harlow. The motion was carried.

H 415, RELATING TO EXPIRATION OF DRIVERS' LICENSES; AMENDING SECTION 49-322, IDAHO CODE, TO STRIKE PROVISIONS RELATING TO THE AUTOMATIC RENEWAL OF AN IDAHO OPERATOR'S LICENSE TO PERSONS SERVING IN THE ARMED FORCES OF THE UNITED STATES, was presented by Mr. Hale.

MOTION: Mr. Hale moved that H 415 be printed,
H 415 seconded by Mr. Brooks. The motion was carried.

H 416, RELATING TO TESTING BLOOD OF BREATH OF VICTIMS IN MOTOR VEHICLE ACCIDENTS; AMENDING SECTION 49-1016, IDAHO CODE, BY PROVIDING THAT TESTS SHALL BE OBTAINED FROM SURVIVING MOTOR VEHICLE OPERATORS INVOLVED IN MOTOR VEHICLE ACCIDENTS FATAL TO OTHERS, was presented by Mr. Hale.

MOTION: Mr. Hale moved that H 416 be printed,
H 416 seconded by Mr. Munger. The motion was carried.

H 417, RELATING TO LOCAL IMPROVEMENT DISTRICTS FOR IRRIGANTION PURPOSES; AMENDING SECTION 50-1706, IDAHO CODE, TO PROVIDE THAT COUNTIES MAY CREATE LOCAL IMPROVEMENT DISTRICTS TO CONSTRUCT IRRIGATION SYSTEMS AND TO PROVIDE THAT LCOAL IMPROVEMENT DISTRICTS SHALL NOT CONTAIN TRACTS OF FIVE ACRES OF MORE WITHOUT THE WRITTEN CONSENT OF THE OWNER, was presented by Mr. Harlow.

MOTION: Mr. Harlow moved that H 417 be printed,
H 417 seconded by Mrs. Bunting. The motion was carried.

H 418, RELATING TO THE DELIVERY OF WATER IN SUBDIVISIONS; AMENDING CHAPTER 38, TITLE 31, IDAHO CODE, BY THE ADDITION THERETO OF A NEW SECTION 31-3805, IDAHO CODE, TO PROVIDE FOR THE DELIVERY OF WATER IN SUBDIVISIONS LOCATED IN IRRIGATION DISTRICTS, AND SETTING REQUIREMENTS FOR THOSE CASES IN WHICH NO PROVISION IS MADE FOR THE DELIVERY OF WATER, was presented by Mr. Hosack.

MOTION: Mr. Hosack moved that H 418 be printed,
H 418 seconded by Mr. Harlow. The motion was carried.

H 419, RELATING TO THE PURPOSES OF LOCAL PLANNING; AMENDING SECTION 67-6502, IDAHO CODE, TO PROVIDE THAT PROTECTION AGAINST NOISE POLLUTION SHALL BE WITHIN CONDITIONS CONSIDERED AS PROMOTION OF HEALTH, SAFETY, AND GENERAL WELFARE, was presented by Mr. Hosack.

MOTION: Mr. Hosack moved that H 419 be printed,
H 419 seconded by Mr. Swisher. The motion was carried.

H 420, PROVIDING FOR FISCAL YEARS AND CASH BASIS ACCOUNTING FOR CITIES AND COUNTIES, was presented by Mr. Hosack.

MOTION: Mr. Hosack moved that H 420 be printed,
H 420 seconded by Mr. Harlow. The motion was carried.

H 421, RELATING TO COUNTY PROBATION OFFICERS; AMENDING SECTION 16-1820, IDAHO CODE, BY STRIKING THE REQUIREMENT THAT SELECTION AND COMPENSATION OF COUNTY PROBATION OFFICERS SHALL BE DONE IN ACCORDANCE WITH THE PROVISIONS OF THE STATE MERIT SYSTEM, was presented by Mrs. Bunting.

MOTION: Mrs. Bunting moved that H 421 be printed,
H 421 seconded by Mr. Brooks. The motion was carried.

H 422, RELATING TO SELF-GOVERNING POWERS OF CITIES; AMENDING SECTION 50-301, IDAHO CODE, TO PROVIDE THAT CITIES MAY EXERCISE AND PERFORM ALL FUNCTIONS OF LOCAL SELF-GOVERNMENT NOT PROHIBITED BY LAW OR BY THE CONSTITUTION, was presented by Mr. Munger.

MOTION: Mr. Munger moved that H 422 be printed,
H 422 seconded by Mr. Harlow. The motion was carried.

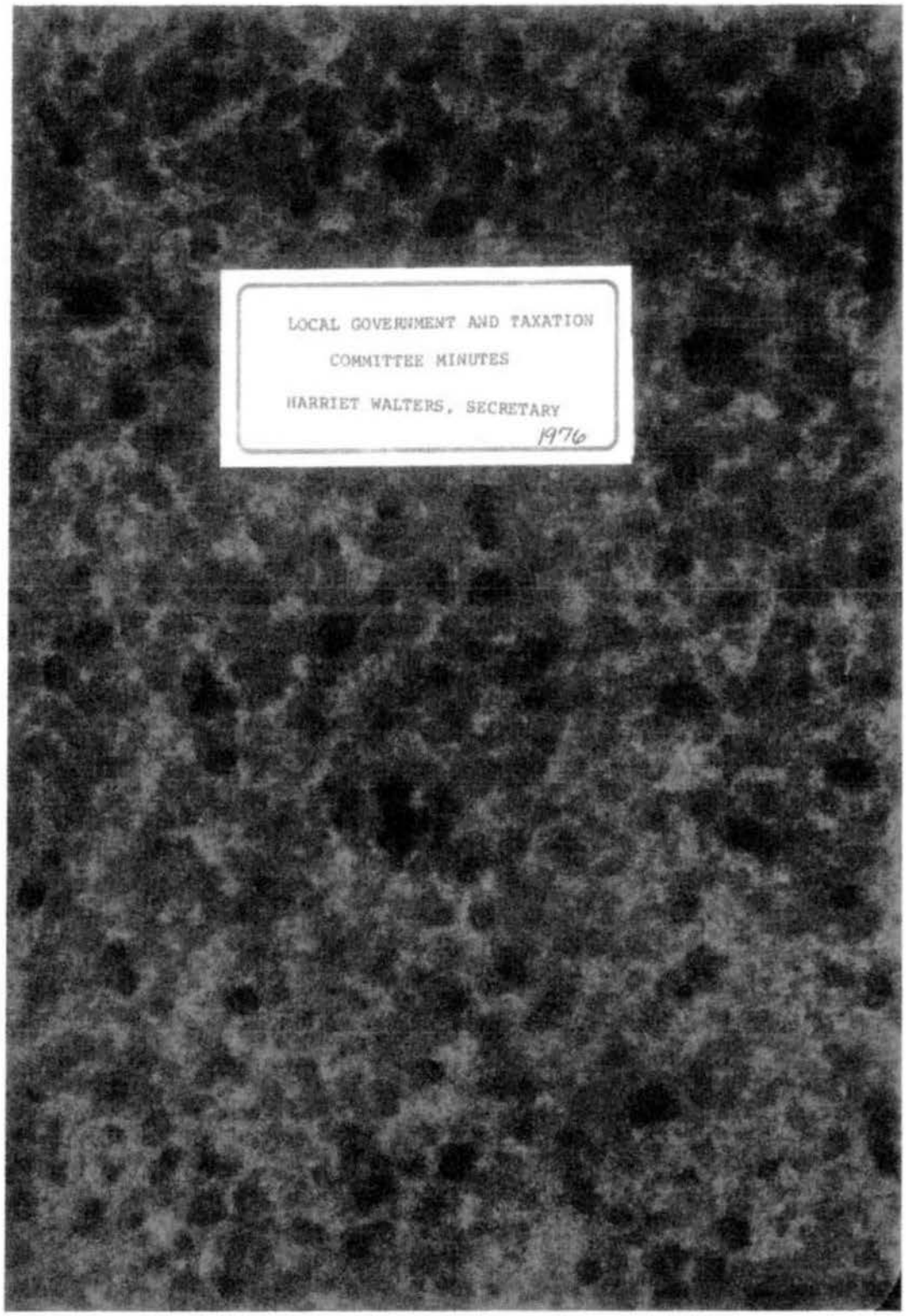
H 359, PROVIDING FOR USES OF HIGHWAY USERS REVENUE, was presented by Mr. Hale. It was stated that the Transportation and Defense Committee, sponsor, had submitted a corrected statement of purpose.

MOTION: Mr. Hale moved that H 359 be printed,
H 359 seconded by Mr. Swisher. The motion was carried.

The meeting was adjourned.
BILLS HELD: H 354 (replaced by H 361), H 370 (replaced by H 382), H 391 (defective)

GEORGE DANIELSON, Chairman

Becky Levi, Secretary


LOCAL GOVERNMENT AND TAXATION
COMMITTEE MINUTES
HARRIET WALTERS, SECRETARY
1976

MINUTES

LOCAL GOVERNMENT & TAXATION

SECOND REGULAR SESSION

FORTY-THIRD LEGISLATURE

The LOCAL GOVERNMENT AND TAXATION COMMITTEE met Wednesday, March 10, 1976, at 8:30 a.m. All members being present, the Chairman called the meeting to order. Their were many visitors to the commttee, some of those were Carol M. Dick, Washington County Assessor; Dick Greener, Home Builders Association; Pat Harwood, Idaho Association of Commerce and Industry; Paul Ennis, Attorney, Asso.ICI, Jim Weatherb AIC; Flip Kleffner, Ada County Commissioners; Bill Schroeder, Ada County Assessors; J. L. Clark, Attorney; A. L. Smith, City Attorney of Idaho Falls.

H 593 - The purpose of this bill is to give property owners three years to pay the increased taxes when taken into the city by annexation. Mr. Smith, City Attorney for Idaho Falls, told the committee that the city of Idaho Falls is against this bill, because it is rather complicated bookkeeping. When these areas are taken into the city, there is a great expense right away with such items as getting streets up to standard, sewers, garbage collecting, and etc. This is why we need the taxes now because we start our obligation right away.

Representative Harlow favors this legislation because if softens the effects on annexation and does hope that the committee will send it out.

Flip Kleffner, Ada County Commissioner, told the committee that the Ada County Treasurers office is against this bill. Dick Greener, representing Home Builders Association, told the committee that they favor this bill, feel that it would be a good check and balance bill. Senator Hartvigsen moved, to send H 593 to the floor with a do-pass. The motion failed for lack of a second. Senator Hartvigsen moved, Senator Tacke seconded, to send H 593 to the floor without recommendation. The motion carried five ayes, four nos.

Cobbs - aye
Summers - no
Klein - no
Watkins - no
Little - no
Saxvik - aye
Tacke - aye
Hartvigsen - aye
Judd --aye

H 422 - Mr. Weatherby told the committee that the purpose of this bill is to grant a limited form of local self-government authority to Idaho cities. Currently, Idaho's cities may exercise only those powers and perform only those functions specifically mentioned in the Constitution of the State of Idaho or in the Idaho Code. Mr. Weatherb

said that the cities should be given those authorities that are not granted by the Constitution and the Idaho Code. With the passage of H 422 the Legislature would give them home rule, then we can come back and propose to the Legislature areas we feel that are too restrictive or in conflict the Code. This is a most limited form of home rule. Does not provide areas beyond the control of the Legislatu

Senator Risch asked where in the Code does it limit them from levying any taxes? There were some amendments suggested to help with this problem.
Pat Harwood, Caldwood, Association of Idaho Commerce & Industry, said that this bill could be very far reaching. Paul Ennis, attorney for the Association of Idaho Commerce and Industry presented a testimony and it is attached to this set of minutes.

The meeting was in recess until noon.

The Committee took up again at 12:10 with a lunch meeting. We continued talking about H 422.

H 422 - Mr. Smith, Idaho Falls City Attorney, told the committee that the city of Idaho Falls feels that the cities should be able to pass an ordnance to take care of the problems that their cities have.

Mr. Ennis and Mr Greener brought amendments that they would like to have the committee place on H 422. Mr. Decker, AIC, hopes that the committee would not place H 422 in the 14th Order. Mr. Max Yost told the committee that these two amendments would make the bill a litt more liveable to the Association of Idaho Taxpayers. The amendment onl acts to strength it but does not go far enough to give Idaho a good strong Home rule. I (Mr. Yost) believes that Idaho does have a good basis for home rule now.

Senator Klein moved, Senator Summers second, to send H 422 to the floor without recommendation. Senator Risch made a substitute motion to send H 422 to the Fourteenth Order for Amendment. Senator Watkins seconded the motion. The motion was tied and failed. Senators Cobbs Summers, Klein, Saxvik and Tacke voted no. Senators Watkins, Little, Risch, Hartvigsen and Judd voted aye. The main motion carried with seven ayes, and three nos.

Cobbs - aye
Summers - aye
Klein - aye
Watkins - no
Little - no
Risch - no
Saxvik - aye
Tacke - aye
Hartvigsen - aye
Judd - no

H 663 - The purpose of this bill is to grant city and county voters the freedom to authorize their city or county governments to adopt and implement a sales and use tax. In doing this it was felt that their could be a relief in the property taxes. Mr. Decker told the committee that H 663 would give the local voters the authority to place a tax on themselves. The property tax would rise less rapidly with the use of a city sale tax. Senator Hartvigsen moved, Senator Summers seconded to send H 663 to the floor with a do-pass recommendation. Senator Watkins made a substitute motion to send H 663 to the floor without recommendation. Senator Judd seconded the motion. The motion failed. Those voting no were Senators Cobbs, Klein, Little Risch, Saxvik, and Hartvigsen. Those voting aye were Senators Summers, Watkins, Tacke, Judd. The main motion failed. Those voting no were Senator Cobbs, Klein, Watkins, Risch, Little, Saxvik. Those voting aye were Senators Summers, Tacke, Hartvigsen, and Judd.

H 598 - The purpose of this bill is to let the Mayor and City Council act as a urban renewal agency. This bill would provide for the removal of urban renewal commissioners for inefficiency, neglect of duty, or misconduct in office; and provide that the governing body of any ci may appoint and designate itself to be the Board of Commissioners of the Urban Renewal Agency. Senator Hartvigsen moved, Senator Risch seconded, to send H 598 to the floor without recommendation. The moti carried unanimously.

H 535a - Mr. Huntsman, Clerks and Commissioners, told the committee that 24 counties are at their maximum current expense levy. This bill would remove the district courts from the current expense levy and place a 2 mill increase in taxes for the courts alone. Senator Summer moved, Senator Judd seconded, to send H 535a to the floor with a do-pa The motion failed.

Cobbs - no
Summers - aye
Klein - no
Watkins - no
Little - aye
Risch - no
Saxvik - no
Tacke - aye
Hartvigsen - no
Judd - aye

H 534 - This bill would require the assessor to furnish the taxpayer with personal property reporting forms in duplicate. Senator Summers moved, Senator Risch seconded to send H 534 to the floor with a do-pas recommendation. The motion carried unanimously.

H 558 - This bill amends the current statute by removing reference to a particular meeting of the Board of Commissioners meeting as a Board of Equalization, thereby affording the taxpayer a time for appeal from the subsequent Board of Equalization. Senator Risch moved, Senator Summers seconded to send our H 558 with a do-pass recommendation.

The motion carried unanimously.

H 605 - This bill provides a taxpayer with an appeal process on an assessment made after the meeting of the County Commissioners meeting as a subsequent board of equalization in November. Senator Risch moved Senator Summers seconded, to send H 605 to the floor with do-pass. The motion carried.

H 606 - Mr. Clark told the committee that this amendment institutes a certification program for appraisers. Senator Saxvik moved, Senator Risch seconded, to send H 606 to the floor with a do-pass recommendatio The motion carried.

Chairman Cobbs thanked the members for coming and for giving up their lunch hour. The meeting was adjourned.

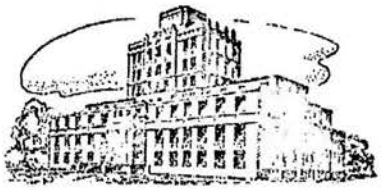
Harriet Walters
HARRIET WALTERS, SECRETARY

Lyle R. Cobbs
LYLE R. COBBS, CHAIRMAN

DATE 3-10-76

RECORD OF VISITORS TO COMMITTEE

NAME AND TITLE	REPRESENTING	BILLS INTERESTED IN
[illegible] McLeod	[illegible] Assn.	HB 606
[illegible] Greener	HBRS	HB 593, HB422
[illegible] Harwood	I.A.C.I.	HB-422
[illegible] B. Evans	Asse. 2 C.T.	HB-422
[illegible] P. Vinke	Ida assessors	
Weatherby	AIC	HB 422
[illegible] Hoffman	Ada Court	593 HB 663
[illegible] Johnson	Ada County Assessor	HB 534 558 605
E Cavs.	Ida County	H. B 534 606 558 593 605
L. Smith	Ada Falls	HB593 & 422



ADA COUNTY
STATE OF IDAHO
MARJORIE JONASSON, TREASURER
BOISE, IDAHO

March 10, 1976

Ada County Board of Commissioners
Ada County Courthouse
Boise, Idaho

Re: House Bill No. 593
RELATING TO THE IMPACT OF PROPERTY TAXES FROM ANNEXATION; PROVIDING A STATEMENT OF PURPOSE: AMENDING CHAPTER 22, TITLE 63 IDAHO CODE, BY THE ADDITION OF A NEW SECTION 63-2220A, IDAHO CODE, TO PROVIDE THAT THE IMPACT OF CITY ANNEXATION ON CERTAIN CITY PROPERTY TAX LEVIES SHALL BE SPREAD ACROSS THREE YEARS; DECLARING AN EMERGENCY AND PROVIDING FOR RETROACTIVE APPLICATION.

Gentlemen:

The projected impact of House Bill No. 593 would be considerable on the work load of this particular office. Our employee increase could run at a maximum of 50%; and at a minimum of 20%, depending upon the method chosen to implement this bill. Also, the above percentages are only the increase in the treasurer's office employees and do not take into account the additional burdens placed on data processing, auditing and assessing. It is the feeling of the Idaho County Treasurers that this bill would create a bookkeeping nightmare, with very little savings to the taxpayers after the expenses that would be involved in complying with this bill.

Very truly yours,

MARJORIE JONASSON

By Mary J. Fannin
Chief Deputy

[illegible] ASSOCIATION OF COMMERCE & INDUSTRY
P. O. BOX 389
SIMPLOT BUILDING
BOISE, IDAHO 83701
PHONE 208 - 343-1849

March 9, 1976

The Honorable Lyle Cobbs
Chairman, Senate Local Government
and Taxation Committee
Idaho State Senate
Statehouse
Boise, ID 83720

Dear Senator:

Considerable interest has been expressed in HB 422, now before your Committee, by members of this Association.

Concern centers in uncertainty as to exactly what new authority HB 422 will convey to city governments, if enacted, and how far-reaching it could become.

Sponsors of the bill have provided assurances as to the intent of the measure, but disturbing doubts linger and remain unanswered. Further, these misgivings have been intensified by the opinion .... copy enclosed .... from attorney Paul Ennis.

It is our belief that HB 422 should be amended as attorney Ennis suggests. Additionally, we believe other amendments should be prepared to make specific the new powers HB 422 is to convey.

We urge this course of action by your Committee.

Sincerely,

Leo V. Bodine
President

Encl.
cc: Members of Senate Local Govt. Committee

March 13, 1976

TO: Local Government & Taxation Committee

FROM: Senator Cobbs

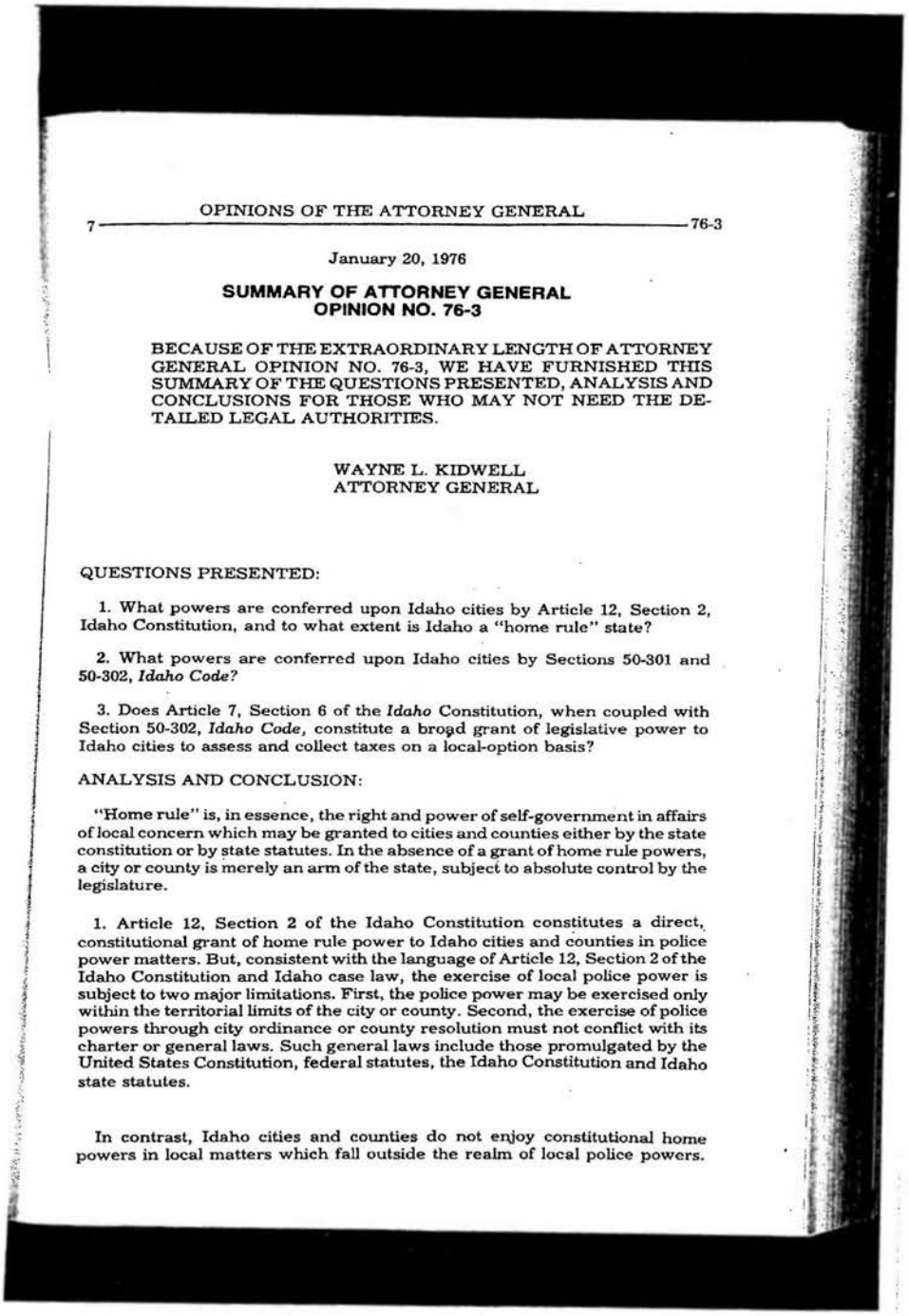
SUBJECT: Senate Bill 1338

Shall the Local Government & Taxation Committee recommend concurrence in the House Amendments to Senate Bill 1338?

	YES	NO
Cobbs	X	
Summers	X	
Klein	X	
Watkins	X	
Little	X	
Risch		
Saxvik	X	
Tacke	X	
Hartvigsen		
Judd		X

EXHIBIT B: OPINION OF THE ATTORNEY GENERAL ON IDAHO CODE § 50-301

Note: This opinion evaluates the statute before the 1976 amendment. It does not address the effect of the amendment. This is the opinion referenced in the legislative history.



January 20, 1976

SUMMARY OF ATTORNEY GENERAL OPINION NO. 76-3

BECAUSE OF THE EXTRAORDINARY LENGTH OF ATTORNEY GENERAL OPINION NO. 76-3, WE HAVE FURNISHED THIS SUMMARY OF THE QUESTIONS PRESENTED, ANALYSIS AND CONCLUSIONS FOR THOSE WHO MAY NOT NEED THE DETAILED LEGAL AUTHORITIES.

WAYNE L. KIDWELL
ATTORNEY GENERAL

QUESTIONS PRESENTED:

1. What powers are conferred upon Idaho cities by Article 12, Section 2, Idaho Constitution, and to what extent is Idaho a "home rule" state?

2. What powers are conferred upon Idaho cities by Sections 50-301 and 50-302, *Idaho Code*?

3. Does Article 7, Section 6 of the *Idaho* Constitution, when coupled with Section 50-302, *Idaho Code*, constitute a broad grant of legislative power to Idaho cities to assess and collect taxes on a local-option basis?

ANALYSIS AND CONCLUSION:

"Home rule" is, in essence, the right and power of self-government in affairs of local concern which may be granted to cities and counties either by the state constitution or by state statutes. In the absence of a grant of home rule powers, a city or county is merely an arm of the state, subject to absolute control by the legislature.

1. Article 12, Section 2 of the Idaho Constitution constitutes a direct, constitutional grant of home rule power to Idaho cities and counties in police power matters. But, consistent with the language of Article 12, Section 2 of the Idaho Constitution and Idaho case law, the exercise of local police power is subject to two major limitations. First, the police power may be exercised only within the territorial limits of the city or county. Second, the exercise of police powers through city ordinance or county resolution must not conflict with its charter or general laws. Such general laws include those promulgated by the United States Constitution, federal statutes, the Idaho Constitution and Idaho state statutes.

In contrast, Idaho cities and counties do not enjoy constitutional home powers in local matters which fall outside the realm of local police powers.

Thus, Idaho cities and counties must look to enabling legislation to validate all actions, such as the raising of revenue and the making of local improvements, which fall outside the realm of local police powers.

2. Sections 50-301 and 50-302, *Idaho Code*, are both general statutes relating to city powers. It is the opinion of the Attorney General that neither statute grants to Idaho cities any more power than is already conferred upon them by Article 12, Section 2 of the Idaho Constitution and by state statutes. These statutory sections do not constitute a general grant of power to Idaho cities, but rather act as a limitation upon the powers of cities. Thus, neither Section 50-301, *Idaho Code*, nor Section 50-302, *Idaho Code*, can be considered a grant of legislative home rule regarding matters beyond the realm of police powers.

3. Article 7, Section 6 of the Idaho Constitution is a constitutional provision which grants to the legislature the authority to invest, by law, local taxation powers in cities and counties. It is the opinion of the Attorney General that Article 7, Section 6 of the Idaho Constitution, when coupled with Section 50-302, *Idaho Code*, does not constitute a broad grant of legislative power to Idaho cities to assess and collect taxes on a local-option basis for two major reasons. First, on its face, Article 7, Section 6 of the Idaho Constitution requires enabling legislation to invest powers of taxation in municipal corporations. Such constitutional limitation cannot be supplanted by a general statutory enactment, such as Section 50-302, *Idaho Code*. Second, based upon the analysis of Section 50-301, *Idaho Code*, in response to question 2, Section 50-302, *Idaho Code*, does not constitute a general grant of power to cities, and thus, Section 50-302, *Idaho Code*, cannot be construed to be a law investing taxation powers in municipal corporations.

ATTORNEY GENERAL OPINION NO. 76-3

TO: Mr. F. W. Roskelley
Councilman, Pocatello
President, Association of Idaho Cities

Mr. R. R. Eardley
Mayor, Boise
Second Vice President
Association of Idaho Cities
1402 Broadway
Boise, Idaho 83706

Per request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. What powers are conferred upon Idaho cities by Article 12, Section 2, Idaho Constitution, and to what extent is Idaho a "home rule" state?

2. What powers are conferred upon Idaho cities by Sections 50-301 and 50-302, *Idaho Code*?

3. Does Article 7, Section 6 of the Idaho Constitution, when coupled with

Section 50-302, *Idaho Code*, constitute a broad grant of legislative power to Idaho cities to assess and collect taxes on a local-option basis?

CONCLUSIONS:

1. Article 12, Section 2, Idaho Constitution, confers upon Idaho cities constitutional "home rule" only to the extent of police power functions. As to all other matters, Idaho cities must look to the legislature for enabling legislation.

2. Sections 50-301 and 50-302, *Idaho Code*, grant to cities no greater powers than those expressly granted by the constitution or state statutes.

3. Article 7, Section 6 of the Idaho Constitution, when coupled with Section 50-302, *Idaho Code*, does not constitute a broad grant of legislative power to Idaho cities to assess and collect taxes on a local-option basis.

ANALYSIS:

Due to the confusion and ambiguity surrounding the existence of home rule in Idaho, an introduction seems appropriate. As a general rule,

> (m)unicipal corporations are political subdivisions of the state, *and in the absence of constitutional restrictions*, the legislature has absolute control over the number, nature, and duration of the powers conferred, and the territory over which they shall be exercised, and may qualify, enlarge, abridge, or entirely withdraw at its pleasure the powers of a municipal corporation. C. Rhyne, Municipal Law §4-2, at 61 (1957). (Emphasis added.) See also, 56 Am.Jur.2d Municipal Corporations §98 (1971); 62 C.J.S. Municipal Corporations §107 (1949).

Thus, municipalities generally have no inherent right of self-government or "home rule" unless expressly granted by the state constitution or state statutes. C. Rhyne, Municipal Law §4-2 (1957): 56 Am.Jur.2d Municipal Corporations §125 (1971).

Notwithstanding, in many jurisdictions, state control of municipalities has been limited by either legislative or constitutional home rule provisions. In such jurisdictions, home rule or self-government has been granted and home rule cities may have complete power and authority over matters of local concern, subject to limitation only by constitutional provisions and conflicting state statutes which deal with statewide concerns. 62 C.J.S. Municipal Corporations §108b and §187 (1949); 56 Am.Jur.2d Municipal Corporations §128 (1971).

To further aid in this discussion, another distinction which must be drawn is the distinction between constitutional home rule and legislative home rule. As these two types of home rule connote, under constitutional home rule a city derives power directly from the constitution and, as a result, the power granted is generally equal to the constitutional grant of power to the legislature. In contrast, under legislative home rule, a city's power is derived solely from legislative enactments, and the city is ultimately governed and controlled by

the legislature. Stephen L. Beer in his Idaho Law Review article entitled "Constitutional Home Rule for Idaho Cities" succinctly states the importance of the distinction.

> The distinction between constitutional home rule and legislative home rule is important for many reasons. First, the courts have strictly construed legislative grants of power in favor of the granting power. Constitutional grants of power, on the other hand, are construed broadly in favor of the grantee. Second, legislative grants of power to municipal corporations are not vested rights and the legislature may change, modify or destroy them; whereas, constitutional grants of power cannot be changed or abolished except by constitutional amendment which requires direct consent of the electorate. Therefore, even though the *Idaho Code* grants broad powers to municipal corporations very similar to the grant of power found in Article 12, Section 2 of the Idaho Constitution, the power granted by the legislature does not have the inherent protections afforded constitutional provisions. In addition, in construing grants of power, the courts will strictly interpret them in favor of the legislature. 8 Idaho L. Rev. 355, at 355 (1972). (Citing, 1 Dillon, Municipal Corporations 449 (5th Ed. 1911); 2 McQuillin, Municipal Corporations 804-806 (3rd Ed. 1966); Id. at 15; *Idaho Code* §50-302.)

Assuming a constitutional home rule provision exists, a final determination which must be made is whether or not the constitutional provision is self-executing. If a constitutional home rule provisions is self-executing, no action by the legislature is necessary to make it effective. That is, the provision itself provides a basic source of local government power. 1 Antieau, Municipal Corporation Law §3.01 (1975). In contrast, constitutional home rule provisions which are not self-exacting require legislative enactments pursuant to constitutional mandates in order to make home rule effective. 1 Anieau, Municipal Corporation Law §3.01 (1975); 1 McQuillin, The Law of Municipal Corporations §3.2lb (3rd Ed. J. Dray 1971).

In sum, the following inquiries must be made. First, is Idaho a home rule state, and if so, to what extent? Second, if a home rule state, is Idaho governed by constitutional home rule or legislative home rule? Third, if governed by constitutional home rule, does Idaho have a self-executing home rule provision?

1. Regarding the issue of whether or not Idaho is a home rule state, a review of the authorities and Idaho case law raises ambiguities and differences of opinion. The Specific constitutional provision in question is Article 12, Section 2 of the Idaho Constitution which states:

> Local police regulations authorized — Any county or incorporated city or town may make and enforce, within its limits, all such local police sanitary and other regulations as are not in conflict with its charter or with general laws.

Various authorities, citing this Idaho constitutional provision, unequivocally state that Idaho, along with about thirty other states, is a constitutional home

rule state. See, 1 Antieau, Municipal Corporation Law §3.00 (1975); Rhyne, Municipal Law §4-3 (1957); 38 Was. L. Rev. 743 (1963). Futher, in a lengthy analysis, Stephen L. Beer concluded, in his law journal article entitled "Constitutional Home Rule for Idaho Cities"' that Idaho does recognize constitutional home rule. 8 Idaho L. Rev. 355 (1972). In addition Antieau contends that the constitutional home rule provisions of the Idaho constitution, like California and Washington, among others, are self-executing and are basic sources of local government power. 1 Antieau, Municipal Corporation Law, §3.01 (1975).

From a review of these above-cited authorities, it appears that the major reason they consider Idaho a constitutional home rule state is that the Idaho constitutional provision is virtually identical to constitutional provisions of California and Washington, and that the constitutional provisions of California and Washington have been interpreted to grant constitutional home rule to cities. For example, in his law journal article, Stephen L. Beer cites the 1964 edition of Antieau's treatise, wherein Antieau takes the position that Idaho cities enjoy a direct constitutional grant of power, but, contends Antieau, the Idaho Supreme Court has often overlooked this power when deciding cases. In reaching his decision, Antieau relies upon the fact that Article 12, Section 2 of the Idaho Constitution is virtually identical to the California Constitution, Article 11, Section 11, through which California cities enjoy constitutional home rule. Antieau states:

> Section 11 (of the California Constitution, Article 11) . . . provides: Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws. Washington's Constitution is the same, and Idaho's would be identical but, as in some other home rule states, the comma after "local" is omitted . . . It should be perceived that the language of these constitutional provisions could hardly be broader. If a local charter provision or ordinance should not be classified as "police" or "sanitary," it would almost always qualify as a "local" one, and in even more instances, it could be characterized as . . . "other." 8 Idaho L. Rev. 355, at 359-360 (1972). Citing, 1 Antieau, Municipal Corporations Law at 95, n. 7, and 100 (1964).

Based upon the above-cited provision, Beer concludes:

> According to Antieau, these constitutional provisions permit home rule cities to enjoy the same police power within their territorial limits as the state has itself. Since the California and Washington constitutions provide home rule to their municipalities, and since Idaho drafted a similar provision, it can be assumed that Idaho's framers of its constitution intended to provide home rule to its cities. The Idaho Supreme Court in *State v. Robbins* has adopted this view and has used California judicial reasoning in interpreting Article 12, Section 2 of the Idaho Constitution on other cases. 8 Idaho L. Rev. 355 (1972), at 359-360. *State v. Robbins*, 59 Idaho 279, 81 P.2d 1078 (1938).

The Attorney General takes issue with such general statements for two

major reasons. First, as will be hereafter noted in the review of Idaho case law, a distinction should be drawn between constitutional home rule only to extent of police powers, as opposed to a comprehensive grant of constitutional home rule in all matters of local concern, as argued by Antieau and Beer. Second, due to differences in the Idaho Constitution as compared with the general constitutional provisions of California and Washington relating to municipal corporations, an across-the-board comparison cannot adequately be made.

Regarding the failure of the above-cited authorities to distinguish a limited form of home rule to the extent of police powers from an all-inclusive form of home rule, even Antieau, in the 1975 edition of his treatise, seems to back down from an all-inclusive interpretation of home rule. Antieau states:

> The California Constitution provides: "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." Another section provides: "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Provisions such as these are held to mean that home rule units *enjoy the same police powers within their borders as does the State itself.* "It is, of course, undisputed," says the California Court , "that a municipality, under Article XI, sec. 11 of the State Constitution may within its limits *exercise police powers* equal in extent to those of the state."
>
> The Washington constitutional clause provides: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Of this clause, the Washington Court has said: *"This is a direct delegation of the police power* as ample within its limits as that possessed by the Legislature itself. It requires no legislative sanction for its exercise so long as the subject-matter is local, and the regulation reasonable and consistent with the general laws." The Idaho constitutional clause is virtually identical, and under it the Idaho Court has said that home rule cities possess *"full police power in affairs of local concern."* (Emphasis added. 1 Antieau, Municipal Corporation Law §3.03, at 3-11 and 3-12 (1975). (Citing, Article XI, Section 8 and Article XI, Section 11, California Constitution; *McCay Jewelers v. Bowron*, 19 Cal.2d 595, 122 P.2d 543, 546 (1942); Article XI, §11, Washington Constitution; *Detamore v. Hindley*, 83 Wash. 322, 326, 145 P. 462 (1915); *State v. Musser*, 67 Idaho 214, 176 P.2d 199, 201 (1946).)

A comparison of these two positions taken by Antieau reveals that in his 1964 treatise, Antieau says that the constitutional provisions of Idaho, California and Washington grant very broad powers to municipalities. In contrast, in his 1975 edition, Antieau cites only authorities which say that the constitutional provisions of Idaho, California and Washington give a direct grant of police power in affairs of local concern, as opposed to a general grant of power over all municipal affairs. As will be shown in the analysis of Idaho case law, Antieau's

latter position comports with the position of the Idaho Attorney General.

Regarding a comparison between Idaho, California and Washington, there seems to be a danger in unequivocally saying that Idaho is a constitutional home rule state merely because California and Washington, with similar constitutional provisions, are constitutional home rule states. First, even though the constitutional provision allowing cities and counties to make and enforce all local police, sanitary and other regulations which are not in conflict with general laws are similar in the three states, both California and Washington also include constitutional provisions expressly providing for the adoption of city charters. In 1 McQuillin, The Law of Municipal Corporations §3.41, at 309 (3rd ed. Dray 1971), it is noted: "The method of creating a home rule charter is usually fixed by the constitution in the states where such charters are permitted, . . . " The Idaho Constitution contains no such provision relating to the adoption of home-rule charters. Second, similarly to Idaho, there is also dispute in Washington as to whether Washington is a constitutional home rule state.

Article 11, §5(a) of the California Constitution provides:

> It shall be competent in any city charter to provide that the city government thereunder may make and enforce all ordinances and regulations *in respect to municipal affairs*, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, *and with respect to municipal affairs shall supersede all laws inconsistent therewith. (Emphasis added.)*

The California Constitution further specifically provides detailed methods for establishing city charters and incorporating cities. (It should be noted that California completely amended its constitutional provisions relating to local government in 1970 but nonetheless, the general intent of the constitutional provisions remains the same, and Article 11, Section 11 of the California Constitution was merely renumbered.

In like manner, Article 11, §10 of the Washington Constitution provides that a city with a population of 20,000 inhabitants or more may "frame a charter *for its own government*, consistent with and subject to the Constitution and laws of this state, . . ." (Emphasis added.) Article 11, §10 of the Washington Constitution then specifically provides the procedures required to prepare and adopt each city charter.

Of course, it is not absolutely necessary, in either California or Washington, for a city to adopt a charter, pursuant to their respective constitutional provisions, in order to exercise all home rule powers. That is, all California and Washington cities, regardless of home-rule charters, are granted constitutional home rule at least to the extent of local police powers A home-rule charter only makes it more difficult for the legislature to pre-empt home rule authority by passing a general law.

In contrast to the California and Washington Constitutions, there are no

constitutional provisions in Idaho relating to the adoption of home rule charters. The Idaho Constitution merely provides that the legislature shall establish general laws relating to the incorporation, organization and classification of cities and towns, such general laws being subject to alteration, amendment or repeal by further general laws. See, Article 12, §1, Idaho Constitution. Thus in the absence of a comparable Idaho constitutional provision, an *unqualified* comparison of constitutional home rule among the three states cannot adequately be made. This is not to say that California and Washington case law may never be looked to for guidance, but rather, when used, California and Washington cases must be qualified depending upon which constitutional provisions the court is interpreting.

By way of further comparison between the Washington and Idaho constitutional provisions, Antieau and Rhyne in their treatises on municipal corporations unequivocally state that Washington is also a home rule state, but an extensive law journal article by Philip A. Trautman, Professor of Law for the University of Washington, concludes that Washington is not a purely home rule state.

> The conclusion to be drawn is that in Washington a home rule city is subordinate to the legislature as to any matter upon which the legislature has acted, whether it be regarded as of state, local, or joint concern. In the event of an inconsistency, the statute prevails. However, in those instances in which the legislature has said nothing, an analysis of interest is vital. If the subject is of paramount state concern, some delegation of power by the legislature, express or implied, to the municipal corporation must be found. This is likewise true in those instances in which there is a joint state-local problem. Since the state will be affected by any action of a municipal corporation, it is necessary that an authorization to act for the legislature be found. In those instances in which the matter is solely of local interest, however, home rule cities may act without a delegation from the legislature, express or implied. To that extent the home rule provision is self-executing. Any other interpretation leaves the provision without meaning, and unless and until the court clearly decides to the contrary, there is no reason to expect such treatment. 38 Wash. L. Rev. 743, 772 (1963).

It must be noted that this conclusion was made in reference to Article 11, Section 10 of the Washington Constitution, that provision which specifically provides that Washington cities containing a population of 20,000 inhabitants or more may frame a charter for their own government; and, as noted above, the Idaho Constitution does not have a comparable provision.

Notwithstanding, Trautman states that due to Article 11, §11 of the Washington Constitution, relating to police powers, a different rule applies with regard to home rule in local police power matters.

> Also requiring separate attention are the police powers of municipalities. Here as with the power of eminent domain, all classes of cities are treated bascially alike. However, whereas in the case of the power of eminent domain no city may act without legislative authorization, in the case of police powers, all cities derive authority

directly from the constitution. 38 Wash. L. Rev. 743, 775 (1963).

Trautman notes that, in Washington, Article 11, Section 11. of the Washington Constitution does grant cities a broad measure of power. Nonetheless, the police powers of cities are strictly limited to their territorial boundries, and where a state statute conflicts with a city ordinance, the state statute always prevails.

Since none of the aforementioned authorities are completely conclusive, resort must be had to Idaho case law for a determination of the status of home rule for Idaho cities.

Idaho Case Law

In his law journal article, Stephen L. Beer states: "The quandry whether the constitution was intended to directly grant constitutional home rule to Idaho municipalities has resulted in confusing case law." 8 Idaho L. Rev. 355, 360 (1972). After a lengthy analysis of most Idaho cases interpreting Article 12, Section 2 of the Idaho Constitution, Beer takes the position that prior to 1938 and the case of *State v Robbins,* 59 Idaho 279, 81 P.2d 1078 (1938), the Idaho Supreme Court did not recognize constitutional home rule. But, Beer contends that, since the *Robbins* case in 1938, the Idaho Supreme Court has, with a few exceptions, taken the position that Idaho does have constitutional home rule.

It seems appropriate to take issue with Beer's position for the reason that he does not adequately distinguish between constitutional home rule regarding police powers, as opposed to constitutional home rule regarding all matters of local concern. It is the position of the Attorney General that the Idaho Supreme Court has always acknowledged constitutional home rule with regard to police powers.

Cases Involving Police Power Matters:

Since the adoption of the Idaho Constitution, there have been approximately thirty-five appellate cases interpreting Article 12, Section 2 of the Idaho Constitution or dealing with related matters, even though Article 12, Section 2 of the Idaho Constitution was not always discussed. (For a summary of these Idaho cases, see Appendix A.) Of these, approximately twenty-nine cases have dealt with the police powers of Idaho cities. Of the approximately twenty-nine cases dealing with the police powers of cities and counties, eighteen cases expressly upheld the city or county ordinance as a valid exercise of police power, and eleven cases held the city or county ordinance conflicted with state law or the case was decided or remanded on other grounds.

Regarding the eighteen cases which upheld city or county ordinances, the Idaho Supreme Court has made the following representative statements. In *State v. Quong,* 8 Idaho 191, 67 P. 491 (1902), the court considered a situation where there was both a state law and a city ordinance making battery a crime. The court stated:

> The ordinance is not in conflict, but in harmony, with the general law.

> The authority of the city to enact police regulations, and to enforce them, where they do not contravene and general law of the state, is, under the provisions of our constitution, beyond question. The municipal government may not take from the citizens any constitutional rights — has no power to do so — yet by the express provisions of section 2, article 12, the power to make and enforce sanitary and police regulations is expressly given to cities and towns. The object of the provision is apparent, its necessity urgent. *State v. Quong*, supra., at 194.

In the case of *Foster's, Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941), the plaintiff challenged the validity of a parking meter ordinance, and the court ruled that such a parking meter ordinance was within the police powers of the city. In its decision, the Idaho Supreme Court did not specifically refer to Article 12, Section 2 of the Idaho Constitution, but did state:

> The police power is a necessary concomitant to complete sovereignty and inheres primarily in the state. The exercise of that power, within the corporate limits of cities and villages, has been delegated to the respective municipalities. The full exercise of that power is one of the governmental duties of the respective municipalities as arms of the state, in preserving the health, safety and general welfare of the people. *Foster's, Inc. v. Boise City*, supra., at 211.

In another case, the court considered the conviction of the defendant under a Boise city ordinance prohibiting the drinking of intoxicationg liquor in a public place, even though there was a state constitutional amendment ending prohibition. The court upheld the validity of the Boise city ordinance and ruled:

> Under the above constitutional provision (article 12, section 2, Idaho Constitution) counties, cities and towns have full power in affairs of local government notwithstanding general laws of the state defining and punishing the same offense. (Citations omitted.)
>
> ***
>
> . . . The ordinance is not repugnant to, nor in conflict with, the statutes, neither does it violate any constitutional principal, but merely a further or additional regulation enacted by the city under its police power, specifically granted to counties, cities and incorporated towns by section 2, article 12, of the Constitution. (Citations omitted.) *State v. Musser*, 67 Idaho 214, 176 P.2d 199 (1946), at 219.

As a final representative case, in *Rowe v. City of Pocatello*, 70 Idaho 344, 218 P.2d 695 (1950), the plaintiff challenged a city ordinance prohibiting door-to-door solicitations declaring such solicitations to be a public nuisance. The city ordinance was upheld as a valid exercise of local police power. In examining Article 12, Section 2 of the Idaho Constitution, the Supreme Court stated:

> This is a direct grant of police power from the people to the municipalities of the state, subject only to the limitation that such regulation shall not conflict with the general laws. Comprehended in

the term, "general laws" are other provisions of the constitution, acts of the state legislature, and, of course, the constitution and laws of the United States. Under this constitutional provision, the cities of this state are in a notably different position than are cities in jurisdictions where their police power is strictly limited to that found in charter or legislative grants. *Rowe v. City of Pocatello,* supra., at 698.

For other Idaho cases upholding city and county ordinances as valid exercises of local police power, see, *State v. Preston,* 4 Idaho 215, 38 P. 694 (1894) (city vagrancy ordinance upheld even though state statute punishing the same offense); *In re Francis,* 7 Idaho 98, 60 P. 561 (1900) (upheld Grangeville city ordinance imposing license taxes on various callings and businesses); *Gale v. City of Moscow,* 15 Idaho 332, 97 P. 828 (1908) (upheld city ordinance prohibiting the sale of liquor within the city limits notwithstanding a state statute generally allowing for the sale of liquor); *Baillie v. The City of Wallace,* 24 Idaho 706, 135 P. 850 (1913) (upheld city's power and control over streets and sidewalks); *State v. Hart,* 66 Idaho 217, 157 P.2d 72 (1945) (upheld city ordinance prohibiting the carrying of a concealed weapon); *Clark v. Alloway,* 67 Idaho 32, 170 P.2d 425(1946) (upheld city vagrancy ordinance even though it was broader in scope than a state statute on the same subject and provided for different penalties); *Clyde Hess Distributing C. v. Bonneville County,* 69 Idaho 506, 210 P.2d 798 (1949) (upheld county regulation establishing more restricted hours for the sale of beer than those provided by state law); *State v. Poynter,* 70 Idaho 438, 220 P.2d 386 (1950) (upheld Pocatello city ordinance prohibiting the driving of an automobile while under the influence of intoxicating liquor even though state statute on same subject); *Gartland v. Talbott,* 72 Idaho 125, 237 P.2d 1067 (1951) (upheld county resolution restricting number of issuable beer licenses in a designated area); *Schmidt v. Village of Kimberly,* 74 Idaho 62, 256 P.2d 523 (1953) (upheld city ordinance regarding financing, establishment and operation of a municipal water and sewage system as valid exercise of police power); *Taggart v. Latah County,* 78 Idaho 100, 298 P.2d 979 (1956) (upheld county ordinance providing more prohibitive hours for the operation of licensed beer establishments than hours prohibited by state law); *State v. Clark,* 88 Idaho 365, 399 P.2d 955 (1966) (upheld county subdivision ordinance as valid exercise of police power); *County of Ada v. Walter,* 96 Idaho 630, 533 P.2d 1199 (1975) (upheld county zoning ordinance as valid exercise of police power).

In twelve other cases, the Idaho Supreme Court considered the validity of various city ordinances and county resolutions adopted under local police powers. Four of these cases held the city ordinance or county resolution conflicted with the general laws of the state, two of these cases held the city ordinance or county resolution was unreasonable and oppressive, and six of these cases were reversed on other grounds.

The four cases which held the city ordinance or county resolution conflicted with the general laws of the state are *In re Ridenbaugh,* 5 Idaho 371, 49 P. 12 (1897); *Mix v. The Board of County Commissioners of Nez Perce County,* 18 Idaho 695, 112 P. 215 (1910); *State v. Frederic,* 28 Idaho 709, 155 P. 977 (1916); and *Citizens for Better Government v. County of Valley,* 95 Idaho 320, 508 P.2d 550 (1973). In the *Ridenbaugh* case, the city ordinance in question permitted gambling within the Boise city limits, in contravention of a state law prohibiting gambling. The court stated:

> Thus, it is shown by the original charter of Boise city, also by section 2 of article 8 of the constitution, and the act amending the charter of Boise city, that it was not the intention of the legislature or the framers of the constitution to empower the council of incorporated cities and towns to pass ordinances in conflict with the general laws of the state. . . It is not the intention to permit or authorize the councils of incorporated cities to legalize, by ordinance, acts prohibited as criminal by the general criminal laws of the state, or to enforce ordinances in conflict with the general law. In case of a conflict, the ordinance must give way. In re Ridenbaugh, supra., at 375.

Thus, the city ordinance was declared invalid not because there was no express legislative authorization for its enactment, but rather because the ordinance conflicted with the general laws of the state.

Mix v. Board of County Commissioners of Nez Perce County, supra., involving a conflict between a county ordinance prohibiting the sale of liquor within the county and a Lewiston city ordinance allowing the sale of liquor within the city. The county prohibition was based upon a vote of the people of Nez Perce County under a state statute allowing local option in the prohibition of liquor. The court held that since the state statute allowing local option to the counties was a general law of the state, a county resolution adopted pursuant thereto was likewise a general law. Thus, the city ordinance was declared invalid upon the grounds that it conflicted with the general law of the state. In view of the state statute giving counties local option, this decision does not conflict with the general premise that cities and counties co-equally share their constitutional grant of police power.

The case of *State v. Frederic,* supra., is often cited for the proposition that the Idaho Supreme Court does not recognize constitutional home rule. The case states:

> A municipal corporation possesses only such powers as the state confers upon it, subject to addition or diminution at its discretion. These powers are conferred by the legislature under either special charter or general law. It is a well settled rule of construction of grants of power by the legislature to municipal corporations, that only such powers and rights can be exercised under them as are clearly comprehended in the words of the act or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by legislature must be resolved in favor of the granting power. Regard must also be had to constitutional provisions intended to secure the liberty and to protect the rights of citizens to the end that no citizen shall be deprived of life, liberty or property without due process of law. *State v. Frederic,* supra., at 715.

It is the opinion of the Attorney General that *State v. Frederic* need not be so narrowly read. In *State v. Frederic,* the defendant was indicted under a city ordinance for unlawful possession of liquor. Disposition of the case was complicated by the fact that the city ordinance in question had been adopted pursuant to statutory authority allowing cities to "license, regulate and prohibit the

selling or giving away" of intoxicating liquor, but after adoption of the city ordinance, Kootenai County and the City of Coeur d'Alene had adopted local-option prohibition thus, making the statutory authority inapplicable. In addition, after the adoption of the city ordinance, the state had passed a statute making Idaho a prohibition state. The court stated:

> While, as before stated, the ordinance, except in the matter of punishment, being in substance a reenactment of the provisions of Senate Bill 50, might be contended to be in harmony with the state law and therefore not repugnant to sec. 2, art. 12 of the constitution, yet the question of conflict between the ordinance and the provisions of the state law in the matter of punishment is not a serious question involved in this case. *The real question for our determination is one of jurisdiction.* That is: Can a municipality confer upon police judges jurisdiction to summarily hear and determine acts denominated by the general law of the state indictable misdemeanors, by the enactment of an ordinance prohibiting such acts and prescribing a punishment therefor? *State v. Frederic*, supra., at 715-716.

It was concluded by the court that it was not the intention of the legislature to authorize municipalities to prohibit acts which, under the general laws of the state, were indictable misdemeanors. It was also noted that Article 1, Section 8 of the Idaho Constitution expressly prohibited the legislature from giving municipalities such jurisdiction over indictable misdemeanors.

> To hold otherwise would be to concede that police magistrates have unlimited jurisdiction in all criminal matters, and that municipalities could by ordinance punish acts which, under the general laws, are felonies, such as murder, robbery, burglary, which would be in violation of the constitution and statutes of this state. *State v. Frederic*, supra., at 719.

Thus, the case was decided upon the grounds that the city ordinance, by improperly conferring jurisdiction on police judges, conflicted with general law, both constitutional and statutory, and not on the grounds that Idaho was not a constitutional home rule state with regard to local police powers..

Finally, in the recent case of *Citizens for Better Government v. County of Valley*, 95 Idaho 320, 508 P.2d 550 (1973), a county zoning ordinance was declared invalid for the reason that the county had not followed proper procedures for adoption of zoning ordinances as required by I.C. 50-1204. The Idaho Supreme Court conceded that zoning ordinances were clearly within the police power of a city or county, but held:

> Idaho Const. art. 12, §2, authorizes a county *to make* police regulations not in conflict with the general laws. Although the appellant restricts the definition of a "general law" to laws defining the scope and nature of matters subject to regulation, the definition of "general law" under Idaho Const. art. *12*, §2 is not so narrowly limited. The authority "to make" regulations comprehends not only the nature and scope of the subject matter of the regulation in relation to the general laws, but also the method and manner of its adoption. The authority "to make"

> police regulations as used in the constitution includes the procedures for their adoption, which must not be in conflict with the general laws. A general law may confer direct authority to act as well as supply procedural requirements for the adoption of police regulations under Art. 12, §2. *Citizens for Better Government v. County of Valley*, supra., at 551.

Thus, the county zoning ordinance was invalidated only for the reason that the adoption procedures used conflicted with general state law.

The two cases which held the city ordinance or county resolution invalid because they were unreasonable and oppressive are *Continental Oil Co. vs. City of Twin Falls*, 49 Idaho 89, 286 P. 353 (1930) and *Barth v. DeCoursey*, 69 Idaho 474, 207 P.2d 1165 (1949). In *Continental Oil Co. vs. The City of Twin Falls*, supra., the court declared a city ordinance, which prohibited the construction of gasoline service stations near schools, invalid upon the grounds that it was an unreasonable restriction upon plaintiff's property rights. Notwithstanding, the court determined that, if the city ordinance had not been unreasonable, the police power to validly enact such an ordinance could be inferred from various statutes. The court did not really discuss Article 12, Section 2 of the Idaho Constitution, but did state:

> A municipal corporation possesses only such legislative powers as are conferred upon it *by the Constitution*, charter or general statute. (See, *State v. Frederic*, 28 Ida. 709, 715, 155 Pac. 977). Such powers may be expressly laid down in the charter or legislative act, or they may be necessarily inferred from powers granted. *Continental Oil Co. v. The City of Twin Falls*, supra., at 104. (Emphasis added.)

Since the Idaho Constitution does provide a direct grant of local police power to cities and counties, this statement by the court does not conflict with the premise that Idaho does recognize constitutional home rule to the extent of local police powers.

A Canyon County resolution which prohibited the sale of beer at retail outside the boundaries of cities or villages within the county was declared invalid as being unreasonable, unjust and unduly oppressive in the case of Barth v. DeCoursey, supra. The court did not expressly discuss Article 12, Section 2 of the Idaho Constitution, but in a concurring opinion, Justice Taylor noted that Article 12, Section 2, Idaho Constitution, provides a direct grant of police power to counties and municipalites, which power is held co-equally by counties and municipalities.

The decisions of the six other cases which considered the validity of various city ordinances and county resolutions adopted under local police powers are not so easily categorized. Thus, each case must be considered individually.

In *State v. Robbins*, 59 Idaho 279, 81 P.2d 1079 (1938), the appellant had been convicted of selling beer in the City of Moscow without having received a county license to do so, even though he had obtained a city and state license. The gist of the issue before the court was whether a county resolution constituted a general law capable pf pre-exempting a conflicting city ordinance. The

court ruled that Article 12, Section 2 of the Idaho Constitution granted co-equal authority to counties and cities to adopt police power regulations, and that a county ordinance could not operate as a "general law" capable of invalidating a contrary city ordinance. The Idaho Supreme Court further noted that the constitutional grant of police powers to counties and cities was not without limitation. That is, the constitutional grant of local police power was limited to regulations which did not conflict with general state laws.

In *State v. White*, 67 Idaho 311, 177 P.2d 472 (1947), the Idaho Supreme Court upheld the validity of a city ordinance which prohibited a person from allowing a vicious dog to run at-large within the city limits. The ordinance was held to be a valid exercise of police power, but the case was remanded upon the grounds that the defendant had not received a jury trial.

A similar result was reached in four related cases. In *State v. Romich*, 67 Idaho 229, 176 P.2d 204 (1946), the defendant had been convicted of selling intoxicating liquor in violation of a Boise city ordinance, even though, as in *State v. Musser*, supra., an Idaho constitutional amendment had ended prohibition. The court did not expressly discuss Article 12, Section 2 of the Idaho Constitution, but did rule that a city ordinance prohibiting the sale of intoxicating liquor was a valid exercise of police power, notwithstanding the constitutional amendment ending prohibition. Further, the court found no conflict with general law for the reason that the constitution and state statutes relating to the sale and control of liquor still gave authority to the cities to regulate these matters. The case was remanded upon the grounds that the defendant had not received a jury trial. In addition, the court partially invalidated the validity of the Boise city ordinance for the reason that a special legislative act to amend the Boise city charter provided for greater criminal penalties than those authorized by general law, particularly Section 49-69, I.C.A., later know as Section 49-1109, I.C.A., the forerunner of Section 50-302, *Idaho Code*. The court declared the greater penalty provision void, but nonetheless remanded the case for a new trial, presumably allowing only those penalties authorized by the forerunners of Section 50-302, *Idaho Code*. Accord, *State v. Brunello*, 67 Idaho 242, 176 P.2d 212 (1946); *State v. Leonard*, 67 Idaho 242, 176 'p.2d 214 (1946); *State v. Finch*, 67 Idaho 277, 176 P.2d 214 (1946).

In sum, based upon the foregoing discussion of Idaho case law, it is the opinion of the Attorney General that the Idaho Court has never failed to recognize the direct constitutional grant of police power to cities and counties, pursuant to Article 12, Section 2 of the Idaho Constitution. To this extent, Article 12, Section 2 of the Idaho Constitution is self-executing. Of course, consistent with the language of Article 12, Section 2 of the Idaho Constitution and Idaho case law, the exercise of local police power is subject to two major limitations. First, the police power may be exercised only within the territorial limits of the city or county. Second, the exercise of police power through city ordinance or county resolution must not conflict with its charter or general laws. Such general laws include those promulgated by the United State Constitution, federal statutes, the Idaho Constitution and Idaho state statutes.

Cases Involving Other Matters Of Local Concern:

In matters other than police powers, the Idaho Supreme Court has been more restrictive. There are approximately six cases dealing with Article 12, Section 2 of the Idaho Constitution and related matters. In all of these cases, the Idaho Supreme Court held that enabling legislation by the state legislature was necessary in order to validate the city or county action.

Taking these cases in chronological order, in 1912, the Idaho Supreme Court decided the case of *Byrns v. City of Moscow*, 21 Idaho 398, 121 P. 1034 (1912). the suit sought a Writ of Prohibition prohibiting the City of Moscow from adopting an ordinance which would allow the issuance of municipal bonds to make street improvements. The court only briefly discussed Article 12, Section 2 of the Idaho Constitution, and ruled that Article 12, Section 1 and 2, gave the legislature authority to provide for the incorporation, organization and classification of Idaho cities, "and that such cities and towns shall have the power and authority given them by the laws enacted by the legislature." *Byrns v. City of Moscow*, supra., at 403. Since the questioned city action had not yet been officially adopted as an ordinance the court merely noted all of the state statutes dealing with local improvements by cities, and said that in order to make the proposed ordinance valid and enforceable, the city would have to comply with the applicable statutory provisions.

In like manner, the case of *Bradbury v. City of Idaho Falls*, 32 Idaho 28, 177 P. 388 (1918), an injunction was sought to enjoin the city of Idaho Falls from issuing and selling municipal bonds for the purpose of providing funds to pay for the cost of acquiring an adequate electric light and power plant. The city action was based upon an ordinance passed by the city council, and the court ruled that the power of municipalities to issue bonds must be derived from legislative enactment. Thus, as in *Byrns*, the Supreme Court took the position that the issuance of municipal bonds for local improvements was a matter of statewide concern and was subject to control by the legislature. The court cited 1 Dillon, Municipal Corporations §237 (5th ed.) for the proposition that:

> (i)t is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, — and simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied. . . . *Bradbury v. City of Idaho Falls*, supra., at 32.

It is the contention of the Attorney General that this position does not negate the existence of constitutional home rule with regard to police powers for the reason that the position taken in *Bradbury* clearly states that a municipal corporation may exercise all powers expressly granted, and Article 12, Section 2 of the Idaho Constitution does constitute such an express grant of power.

Then, in 1923, the Idaho Supreme Court considered the case of *State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923). The defendant had been prosecuted for violation of a city ordinance imposing a license tax upon certain businesses. The court held that the clear purpose of the ordinance was to raise revenue,

and was not for the purpose of regulation. As such, the city ordinance violated Article 7, Section 2 of the Idaho Constitution, which provides that only the legislature may impose license taxes on businesses. This case is not dispositive on the issue of constitutional home rule since the city ordinance in question clearly conflicted with a provision of the Idaho State Constitution.

In *Reynard v. City of Caldwell,* 53 Idaho 62, 21 P.2d 527 (1933), the City of Caldwell had levied special assessments against various properties, including city property, for local improvements. The plaintiff, a bond holder, sought a Writ of Mandamus to compel the city to pay its share of the special assessments. The Idaho Supreme Court only briefly discussed Article 12, Sections1 and 2 of the Idaho Constitution and, similarly to their holding in Byrns v. City of Moscow, supra., held that Article 12, Sections 1 and 2 clearly gave the legislature power to provide for the incorporation, organization and classification of cities. But, the court added a qualification not present in their decision in *Byrns*. That is, the court further stated: ". . . such cities and towns shall have the power and authority given them by the laws enacted by the legislature, *subject only to constitutional limitation. . .*" *Reynard v. City of Caldwell,* supra., at 66-67. The court invalidated the city action upon the grounds that the city had attempted to incur an indebtedness exceeding the yearly income and revenue of the city without a two-thirds voter approval, contrary to the requirements of Article 8, Section 3 of the Idaho Constitution. Again, *Reynard* does not represent a limitation upon the constitutional grant of police power to cities; rather, *Reynard* does recognize that the power of the legislature to govern municipalities is subject to constitutional limitations, as may be found in Article 12, Section 2 of the Idaho Constitution.

Finally, in the case of *O'Bryant* v. *City of Idaho Falls,* 78 Idaho 313, 303 P.2d 680 (1956) and *Oregon Short Line Railroad Co.* v. *Village of Chubbuck,* 83 Idaho 62, 357 P.2d 1101 (1960), the Idaho Supreme Court did not discuss Article 12, Section 2 of the Idaho Constitution, but both cases did involve the authority of a city to act in matters other than police power matters. In *O'Bryant,* a declaratory judgment was sought. The lawsuit tested the validity of a city ordinance which granted a franchise to a cooperative gas association for the construction and operation of a gas distribution system within the city. The court again quoted 1 Dillon, Municipal Corporations, (5th ed.) §237 for the proposition that cities could exercise only such powers as were expressly granted, necessarily implied from powers expressly granted, or those essential to the declared objects and purposes of the corporation. The court held that construction, operation and maintenance of a gas distribution system did not fall within the police power of the city, and thus required an express legislative grant of power to validate the city ordinance. No express grant of power was found, and the court declared the city ordinance invalid.

Of more major importance, it should be noted that *O'Bryant* is the only Idaho case in which the Idaho Supreme Court directly addressed itself to a consideration of "home rule" as such, even though the court did not discuss Article 12; Section 2 of the Idaho Constitution. The court ruled:

> *(w)e are not concerned with the merits or demerits of so-called "home rule" by municipalities* whereby the law would empower a municipal-

> ity to construct, operate and maintain its own system of distribution of gas as compared with a system for distribution of gas constructed, maintained and operated by a public utility holding a certificate of convenience and necessity. *Such question is strictly a matter of policy for the people or the legislature and is not for consideration by the court.* This court is only concerned with statutes as it finds them and the application of same to the facts before the court. *O'Bryant* v. *City of Idaho Falls*, supra., at 687. (Emphasis added.)

From this, perhaps it can be said that the Idaho Supreme Court will not declare Idaho a constitutional home rule state as to any matters without clarification of existing law by the legislature, or without clarification by the people through adoption of a constitutional amendment.

In the case of *Oregon Short Line Railroad Co.* v. *Village of Chubbuck*, supra., the court again did not discuss Article 12, Section 2 of the Idaho Constitution. The Village of Chubbuck had enacted a city ordinance attempting to annex railroad land. The court merely held that annexation of additional territory could be expressly granted only by the legislature, and such annexation was subject to the conditions, restrictions and limitations imposed by the legislature. Consequently, the city ordinance was invalidated.

In conclusion, and as illustrated by the above six cases, the Idaho Supreme Court will most probably require enabling legislation to validate all city and county actions which fall outside the realm of local police powers. Thus, beyond the realm of local police powers, Idaho cities and counties do not enjoy constitutional home rule.

2. In response to the second question concerning the powers conferred upon Idaho cities by Sections 50-301 and 50-302, *Idaho Code*, these statutes provide:

> Cities governed by this act (Municipal Corporations Act) shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the cities; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; *and exercise such other powers as may be conferred by law.* I.C. §50-301. (Emphasis added.)

> Cities shall make all such ordinances, by-laws, rules, regulations and resolutions *not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry.* Cities may enforce all ordinances by inflicting fines for the breach thereof, not exceeding the amount permissible in probate, justice and course of similar jurisdiction for any one (1) offense, or penalties not more than thirty (30) days imprisonment in the city jail, or both such fine and imprisonment, recoverable with costs, and in default of payment, to provide for confinement in prison or jail; . . . I.C. §50-302. (Emphasis added.)

Both of these sections were amended in 1967, but the operative provisions of both statutes were previously included as state law under different section numbers.

It is the opinion of the Attorney General that neither of these statutory provisions grant direct power to municipalities, but rather act as limitations upon the powers of municipalities. I.C. §50-301 clearly states that cities may exercise only "such other powers as may be conferred by law." Thus, by its own language, I.C. §50-301 contains an inherent limitation upon a city's power. In contrast, the effect of I.C. §50-302 is not so clearly limited.

There are approximately eight Idaho Supreme Court cases dealing with I.C. §50-302. None of these cases deals with I.C. §50-302 in depth, and the most succinct statement of the powers granted by I.C. §50-302 is found in the case of *Rowe* v. *City of Pocatello*, supra. In examining the powers granted by I.C. §50-1109, the forerunner of I.C. §50-302, the court stated:

> These are broad powers. But in this state acts of the legislature governing municipal police regulations are to be looked to as limitations upon, rather than as grants of power to the municipalities. *Rowe* v. *City of Pocatello*, supra., at 698.

In all other Idaho cases referring to I.C. 50-302, or its forerunners, the Idaho Supreme Court has referred to I.C. 50-302 only to supplement Article 12, Section 2 of the Idaho Constitution, and in consequence, to supplement the proposition that municipalities have police power in affairs of local concern. See, *State* v. *Frederic*, supra. (ordinance in question imposed only the maximum penalties allowable to cities under I.C. §50-302 (then known as S.L. 1915, page 232, Section 2238K)); *Continental Oil Co.* v. *The City of Twin Falls*, supra. (I.C. §50-302 granted a city authority to enact a police power ordinance prohibiting the establishment of gasoline service stations near schools); *State* v. *Romich*, supra. (ordinance in question allowed for greater punishment than that allowed by Section 49-69, I.C.A., later known as Section 49-1109, I.C.A., the forerunner of I.C. §50-302); *State* v. *White, supra.* (Section 49-1109, I.C.A., the forerunner of I.C. §50-302, gave a city power to prohibit the allowing of a vicious dog to run at-large within the city limits); *State* v. *Paynter*, supra. (Section 49-1109, I.C., the forerunner of I.C. §50-302, in conjunction with Article 12, Section 2 of the Idaho Constitution, gave a city power to adopt an ordinance prohibiting the driving of an automobile while under the influence of intoxicating liquor); *Condie* v. *Mansor*, 96 Idaho 345, 528 P.2d 907 (1974) (I.C. §50-302 gave a city power to license a business and regulate it for the general welfare). It is interesting to note that in both *Continental Oil Co.* v. *The City of Twin Falls*, supra., and *State* v. *White*, supra., the Idaho Supreme Court upheld the validity of police power regulations based upon I.C. §50-302, or its forerunners, without even considering Article 12, Section 2 of the Idaho Constitution.

The foregoing case law referring to I.C. §50-302, or its forerunners, offers little evidence regarding the legislative purpose and intent of, or powers conferred by, I.C. §50-302. All of these cases consider only the validity of local police power enactments; that is, I.C. §50-302 has seemingly never been applied to city enactments extending beyond the realm of police powers.

Notwithstanding the absence of explicit case law, it is the opinion of the Attorney General that, for several reasons, neither I.C. §50-301 nor I.C. §50-302 grant cities any more power than is already conferred upon them by Article 12, Section 2 of the Idaho Constitution and by state statutes. First, even though not expressly interpreting I.C. §50-301 or I.C. §50-302, all Idaho cases which have considered the validity of local regulations relating to matters beyond the realm of police powers have held that an express legislative grant of power is necessary. See, "Cases Involving Other Matters of Local Concern," p. 21. Second, in *Rowe v. City of Pocatello*, supra., the Idaho Supreme Court did rule that I.C. §50-302 was not a grant of power to cities, but rather was a limitation upon the power of cities. Third, on its face, I.C. §50-302 contains a limitation of power; that is, city ordinances, by-laws, rules, regulations and resolutions may not be inconsistent with the laws of the State of Idaho. Fourth, I.C. §50-302 refers only to a municipality's interest in the *"peace, good government and welfare* of the corporation and its trade, commerce and industry." (Emphasis added.) The interests encompassed are really no more than police powers, and such police powers are already directly granted to the cities by Article 12, Section 2 of the Idaho Constitution.

In conclusion, it is the opinion of the Attorney General that neither I.C. §50-301 nor I.C. §50-302 grant to cities any more power than is already conferred upon them by article 12, Section 2 of the Idaho Constitution and by state statutes. Such statutory sections can in no way be considered a grant of legislative home rule regarding matters beyond the realm of police powers.

3, In response to the question whether Article 7, Section 6 of the Idaho Constitution, when coupled with I.C. §50-302, constitutes a broad grant of legislative power to Idaho cities to assess and collect taxes on a local-option basis, Article 7, Section 6 of the Idaho Constitution provides:

> The legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, *but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation.* (Emphasis added.)

It is the opinion of the Attorney General that Article 7, Section 6 of the Idaho Constitution, when coupled with I.C. §50-302, does not constitute a broad grant of legislative power to Idaho cities to assess and collect taxes on a local-option basis for two major reasons. First, on its face, Article 7, Section 6 of the Idaho Constitution requires enabling legislation to invest powers of taxation in municipal corporations. Such constitutional limitation cannot be supplanted by a general statutory enactment, such as I.C. §50-302. Second, based upon the analysis of I.C. §50-302 in response to Question 2, I.C. §50-302 does not constitute a general grant of power to cities, and thus, I.C. §50-302 cannot be construed to be a law investing taxation powers in municipal corporations.

AUTHORITIES CONSIDERED:

1. Cal. Const. art. 11, §5(a) (1970), amending Cal. Const. art. 11, §8 (1879).

2. Cal. Const. art. 11, §7 (1970), amending Cal. Const. art. 11, §11 (1879).

3. Idaho Const. art. 7, §6.

4. Idaho Const. art. 12, §1.

5. Idaho Const. art. 12, §2.

6. Wash. Const. art. 11, §10.

7. Wash. Const. art. 11, §11.

8. Idaho Code §50-301 (1967).

9. Idaho Code §50-302 (1967), formerly R.C., §2238, subd. 11; reen. 1911, ch. 81, §1, subd. 11, p. 276; enacted as R.C., §2238k by 1915, ch. 97, §2, p. 232; compiled and reen. C.L. 152:20; C.S., §3948; I.C.A., §49-1109; I.C.A., 50-1109.

10. *County of Ada* v. *Walker*, 96 Idaho 630, 533 P.2d 1199 (1975).

11. *Condie* v. *Mansor*, 96 Idaho 345, 528 P.2d 907 (1974).

12. *Citizens for Better Government* v. *County of Valley*, 95 Idaho 320, 508 P.2d 550 (1973).

13. *State* v. *Clark*, 88 Idaho 365, 399 P.2d 955 (1966).

14. *Oregon Short Line Railroad Co.* v. *Village of Chubbuck*, 83 Idaho 62, 357 P.2d 1101 (1960).

15. *O'Bryant* v. *City of Idaho Falls*, 78 Idaho 313, 303 P.2d 680 (1956).

16. *Taggart* v. *Latah County*, *78 Idaho 100, 298 P.2d 979 (1956)*.

17. *Schmidt* v. *Village* of *Kimberly*, 74 Idaho 62, 256 P.2d 523 (1953).

18. *Gartland* v. *Talbott*, 74 Idaho 125, 237 P.2d 1067 (1951).

19. *State* v. *Poynter*, 70 Idaho 438, 220 P.2d 386 (1950).

20. *Rowe* v. *City of Pocatello*, 70 Idaho 344, 218 P.2d 695 (1950).

21. *Clyde Hess Distributing Co.* v. *Bonneville County*, 69 Idaho 506, 210 P.2d 798 (1949).

22. *Barth* v. *DeCoursey*, 69 Idaho 474, 207 P.2d 1165 (1949).

23. *State* v. *White*, 67 Idaho 311, 177 P.2d 472 (1947).

24. *State* v. *Brunello*, 67 Idaho 242, 176 P.2d 212 (1946).

25. *State* v. *Leonard*, 67 Idaho 242, 176 P.2d 214 (1946).

26. *State* v. *Finch*, 67 Idaho 277, 176 P.2d 214 (1946).

27. *State* v. *Romich*, 67 Idaho 229, 176 P.2d 204 (1946).

28. *State* v. *Musser*, 67 Idaho 214, 176 P.2d 199 (1946).

29. *Clark* v. *Alloway*, 67 Idaho 32, 170 P.2d 425 (1946).

30. *State* v. *Hart*, 66 Idaho 217, 157 P.2d 72 (1945).

31. *Foster's, Inc.* v. *Boise City*, 63 Idaho 201, 118 P.2d 721 (1941).

32. *State* v. *Robbins*, 59 Idaho 279, 81 P.2d 1078 (1938).

33. *Reynard* v. *City of Caldwell*, 53 Idaho 62, 21 P.2d 527 (1933).

34. *Continental Oil Co.* v. *The City of Twin Falls*, 49 Idaho 89, 286 P. 353 (1930).

35. *Sate* v. *Nelson*, 36 Idaho 713, 213 P. 358 (1923).

36. *State* v. *Frederic*, 28 Idaho 709, 155 P. 977 (1916).

37. Bradbury v. *City of Idaho Falls*, 32 Idaho 28, 177 P. 388 (1918).

38. *Baillie* v. *The City of Wallace*, 24 Idaho 706, 135 P. 850 (1913).

39. *Byrns* v. *City of Moscow*, 21 Idaho 398, 121 P. 1034 (1912).

40. *Mix* v. *The Board of County Commissioners of Nez Perce County*, 18 Idaho 695, 112 P. 215 (1910).

41. *Gale* v. *City of Moscow*, 15 Idaho 332, 97 P. 828 (1908).

42. *State* v. *Quong*, 8 Idaho 191, 194, 67 P. 491 (1902).

43. *In re Francis*, 7 Idaho 98, 60 P. 561 (1900).

44. *In re Ridenbaugh*, 5 Idaho 371, 49 P. 12 (1897).

45. *State* v. *Preston*, 4 Idaho 215, 38 P. 694 (1894).

46. 1 Antieau, Municipal Corporation Law at 95, n. 7, and 100 (1964).

47. 1 Antieau, Municipal Corporation Law §§3.00, 3.01, 3.06 (1975).

48. 1 Dillon, Municipal Corporations §237 (5th ed. 1911).

49. 1 McQuillin, The Law of Municipal Corporations §§3.21b, 3.29 (3rd ed. Dray 1971).

50. Rhyne, Municipal Law §§4-2, 4-3 (1957).

51. 8 Idaho L. Rev. 355 (1972).

52. 38 Wash. L. Rev. 743 (1963).

53. 56 Am.Jur.2d Municipal Corporations §§98, 125, 128 (1971).

54. 62 C.J.S. Municipal Corporations §§107, 108b, 187 (1949).

DATED This 19th day of January, 1976.

THE ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:
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APPENDIX A

CHRONOLOGICAL SUMMARY OF IDAHO CASE LAW

As early as 1894, the Idaho Supreme Court began interpreting Article 12, Section 2 of the Idaho Constitution in the case of *State* v. *Preston*, 4 Idaho 215, 38 P. 694 (1894). The defendant in *Preston* was convicted of vagrancy under a city ordinance. The defendant challenged the validity of the city ordinance on the grounds that vagrancy was also punishable under state statute. The Idaho Supreme Court did not discuss Article 12, Section 2 of the Idaho Constitution, but did rule that the city had authority to adopt an ordinance and punish vagrants notwithstanding a state statute on the same subject.

In the case of *In re Ridenbaugh*, 5 Idaho 371, 49 P. 12 (1897), the court considered a conflict between a Boise city ordinance which authorized gambling and a state law which prohibited gambling. The court recognized Boise as a special charter city established prior to the adoption of the Idaho Constitution, but nonetheless ruled:

> Thus, it is shown by the original charter of Boise City, also by section 2 of article 12 of the constitution, and the act amending the charter of Boise City, that it was not the intention of the legislature or the framers of the constitution to empower the council of incorporated cities and towns to pass ordinances in conflict with the general laws of the state . . . It is not the intention to permit or authorize the councils of incorporated cities to legalize, by ordinance, acts prohibited as criminal by the general criminal laws of the state, or to enforce ordinances in conflict with the general law. In case of a conflict, the ordinance must give way. *In re Ridenbaugh*, supra., at 375.

In the case of *In re Francis*, 7 Idaho 98, 60 P. 561 (1900), the Idaho Supreme Court considered a petition for a writ of prohibition which sought to challenge the validity of a Grangeville ordinance imposing certain license taxes upon various callings and businesses. The court briefly referred to Article 12, Section 2 of the Idaho Constitution, and held that this provision of the Constitution authorized the enactment of the challenged ordinance and further, that there

was nothing in the charter of Grangeville or in the general law which prohibited the passing of the ordinance.

In 1902, the Idaho Supreme Court considered a situation in which there was both a state law and city ordinance making battery a crime. The court ruled:

> The ordinance is not in conflict, but in harmony, with the general law. The authority of the city to enact police regulations, and to enforce them, where they do not contravene any general law of the state, is, under the provisions of our constitution, beyond question. The municipal government may not take from the citizens any constitutional right — has no power to do so — yet by the express provisions of section 2, article 12, the power to make and enforce sanitary and police regulations is expressly given to cities and towns. The object of the provision is apparent, its necessity urgent. *State* v. *Quong*, 8 Idaho 191, at 194, 67 P. 491 (1902).

The city ordinance was held to be a valid exercise of local police power.

The Idaho Supreme Court considered the issue of an apparent conflict between a state statute generally allowing the sale of liquor and a city ordinance prohibiting the sale of liquor within the city limits in the case of *Gale* v. *City of Moscow*, 15 Idaho 332, 97 P. 828 (1908). The court considered both Article 12, Section 2 of the Idaho Constitution, and a state statute, S.L. 1907, page 518, which allowed cities to "license, regulate and prohibit selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, . . . " The court further stated that the constitutional provision gave the City of Moscow the authority to make and enforce all necessary "police regulations" relating to the civil government within its jurisdiction.

In the case of *Mix* v. *The Board of County Commissioners of Nez Perce County*, 18 Idaho 695, 112 P. 215 (1910), the suit was based upon a petition for a Writ of Mandamus seeking to compel the county commissioners to issue a liquor license to the petitioner. The County of Nez Perce voted to prohibit the sale of liquor within the county which prohibition conflicted with a Lewiston City ordinance allowing the sale of liquor. Similarly to Boise, Lewiston is a special charter city, chartered prior to the adoption of the Idaho Constitution. The court held:

> Special charter cities cannot by ordinance make acts lawful that are made criminal by the general law of the state. Sec. 2, art. 12, of the state constitution prohibits special charter cities from making or enforcing any local, police, sanitary or other regulation that is in conflict with its charter or the general law of the state. At 705.

The choice by the voters of Nez Perce County to prohibit the sale of liquor within the county was based upon a state statute allowing local option in the prohibition of liquor, and the court ruled that the state statute upon which the prohibition was based was a general law of the state, and thus, a county

resolution adopted pursuant thereto also constituted a general law of the state. The city ordinance was consequently invalidated.

A Writ of Prohibition, prohibiting the City of Moscow from adopting a city ordinance authorizing the issuance of municipal bonds to make street improvements, was sought in the case of *Byrns* v. *City of Moscow*, 21 Idaho 398, 121 P. 1034 (1912). The court only briefly discussed the applicability of Article 12, Section 2, Idaho Constitution, and stated:

> Referring first to the constitutional provisions with reference to the incorporation, organization and classifications of cities and towns, we think that the constitution, art. 11 (sic), sec. 1 and 2, clearly confers upon the legislature to provide for the incorporation, organization and classification of cities, and that such cities and towns shall have the power and authority given them by the laws enacted by the legislature. In the present case, there was an applicable state law allowing local improvements by cities and villages. *Byrns* v. *City of Moscow*, supra., at 403.

The court held that Moscow had the statutory authority to adopt such an ordinance, so long as the statutory procedures were followed.

In *Baillie* v. *The City of Wallace*, 24 Idaho 706, 135 P. 850 (1913), the plaintiff sought to recover for personal injuries alleged to have been sustained by reason of an obstruction over a sidewalk in the City of Wallace. The court merely referred to the language of Article 12, Section 2, Idaho Constitution and applicable state statutes for the proposition that a city is given absolute power and control over streets and sidewalks.

In the case of *Bradbury* v. *City of Idaho Falls*, 32 Idaho 28, 177 P. 388 (1918), the plaintiff sought an injunction to enjoin the city of Idaho Falls from issuing and selling municipal bonds for the purpose of providing funds to pay for the cost of acquiring an adequate electric light and power plant. The action by the city was based upon an ordinance passed by the city council. The court ruled that the power of municipalities to issue bonds must be derived from legislative enactment. In addition, the court held that any such legislative enactment must be strictly construed against the grantee. The court cited 1 Dillon, Municipal Corporations §237 (5th ed.) for the proposition that:

> (i)t is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, — not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied . . . *Bradbury* v. *City of Idaho Falls*, supra., at 32.

The court noted that there was a state statute allowing municipalities to issue

bonds for the purpose of purchasing light and power plants, but using a strict construction of the statute, the court held that the statute did not give a city authority to issue bonds to improve existing light and power plants.

In *State* v. *Frederick*, 28 Idaho 709, 155 P. 977 (1916), the defendant was charged with violating a city ordinance prohibiting the unlawful possession of intoxicating liquor. The ordinance in question was in substance identical to a state statute except that the ordinance imposed only the maximum penalty allowable to cities under *Idaho Code* 50-302, then known as S.L. 1915, page 232, Section 2238K. After adoption of the city ordinance, the state had passed a statute making Idaho a prohibition state, and making possession of liquor an indictable misdemeanor. The court stated:

> A municipal corporation possesses only such powers as the state confers upon it, subject to addition or diminution at its discretion. These powers are conferred by the legislature under either special charter or general law. It is a well settled rule of construction of grants of power by the legislature to municipal corporations, that only such powers and rights can be exercised under them as are clearly comprehended in the words of the act or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the granting power. Regard must also be had to constitutional provisions intended to secure the liberty and to protect the rights of citizens to the end that no citizen shall be deprived of life, liberty or property without due process of law. *State* v. *Frederic*, supra., at 715.

Since the state statute had made possession of liquor an indictable misdemeanor, the actual issue before the court was one of jurisdiction.

> That is: Can a municipality confer upon police judges jurisdiction to summarily hear and determine acts denominated by the general law of the state indictable misdemeanors, by the enactment of an ordinance prohibiting such acts and prescribing a punishment therefor? *State* v. *Frederic*, supra., at 715-716.

The court concluded that it was not the intention of the legislature to authorize municipalities to prohibit acts which, under the general laws of the state; were indictable misdemeanors. In fact, the court noted that Article 1, Section 8 of the Idaho Constitution expressly prohibited the legislature from giving municipalities such jurisdiction over indictable misdemeanors. Thus, the case was decided upon the grounds that the city ordinance, by improperly conferring jurisdiction on police judges, conflicted with the general laws of the state, both constitutional and statutory.

The case of *State* v. *Nelson*, 36 Idaho 713, 213 P. 358 (1923) involved the prosecution of the defendant for violation of a city ordinance imposing a license tax upon certain businesses. The clear purpose of the ordinance was for the purpose of raising revenue and not for the purpose of regulation. The court referred to Article 7, Section 2 of the Idaho Constitution, which provides that only the legislature may impose a license tax. The court held the ordinance an illegal attempt to raise revenue and stated:

> One of the distinctions between a lawful tax for regulatory purposes and one solely for revenue is: if it be imposed for regulation, under the authority of sec. 2, art. 12, of the constitution, the license fee demanded must bear some reasonable relation to the cost of such regulation; . . . At 722.

The court considered a city ordinance prohibiting gasoline service stations near schools in *Continental Oil Co.* v. *The City of Twin Falls*, 49 Idaho 89, 286 P. 353 (1930). While examining the validity of the ordinance, the court stated:

> A municipal corporation possesses only such legislative powers as are conferred upon it by the Constitution, charter or general statute. (See, *State* v. *Frederic*, 28 Ida. 709 (715) 155 Pac. 977.) Such powers may be expressly laid down in the charter or legislative act, or they may be necessarily inferred from powers granted. At 104.

The court then quoted Article 12, Section 2, Idaho Constitution; and further stated that there was no express authority for the enactment of such an ordinance, but the general police power to enact such ordinances could be inferred from the various statutes governing police powers, including I.C. 50-302. Notwithstanding, the court threw out the ordinance upon the grounds that it was an unreasonable restriction upon the plaintiff's property rights.

In *Reynard* v. *City of Caldwell*, 53 Idaho 62, 21 P.2d 527 (1935), the City of Caldwell had levied special assessments against various properties, including city property, for local improvements. The plaintiff, a bond holder, sought a writ of Mandamus to compel the city to pay its share of the special assessments. The Idaho Supreme Court only briefly discussed Article 12, Sections 1 and 2 of the Idaho Constitution, and stated:

> Referring to the constitutional provisions with reference to the incorporation, organization and the classification of cities and towns, we think that the Constitution, article 11 (sic), sections 1 and 2, clearly confer the power upon the legislature to provide for the incorporation, organization, and classification of cities, and that such cities and towns shall have the power and authority given them by the laws enacted by the legislature, subject only to constitutional limitation . . . *Reynard* v. *City of Caldwell*, supra., at 66-67.

The court then referred to Article 8, Section 3 of the Idaho Constitution which provides that no county or city may incur any indebtedness exceeding the yearly income and revenue of the county or city without a two-thirds voter approval. In addition, the legislature had enacted laws concerning the method whereby cities and counties could obtain special assessments for local improvements. The court refused to issue the Writ of Mandamus for the reason that the plaintiff had not shown that the city had lawfully made assessments against its own property.

In *State* v. *Robbins*, 59 Idaho 279, 81 P.2d 1078 (1938), the appellant had been convicted of selling beer in the City of Moscow without having received a county license to do so, even though he had obtained a city and state license. The gist of the case was whether a county conviction could lie where both the

state and city had licensed the defendant. The court cited Article 12, Section 2 of the Idaho Constitution and explained that this section was an exact copy of Article 11, Section 11 of the California Constitution. The court then cited a California case, *Ex parte Knight*, 55 Cal.App. 511, 203 Pac. 777, 778, which stated:

> The only limitation upon the exercise of the power is that the regulations to be made under it shall not be "in conflict with general laws" as this limitation applies equally to regulations of the county and the city it cannot be held by the terms of the limitations that the regulation of either of these bodies is a general law for the other, and it is held that an ordinance passed by a county is not a "general law" within the meaning of this section of the Constitution. Citing, *Ex parte Roach*, 104 Cal. 272, 37 Pac. 1044; *Ex parte Campbell*, 74 Cal. 20, 25, 15 Pac. 318, 5 Am.St. 418.

The Idaho Supreme Court further stated:

> However, the right to an exercise of police power of the state in local police, sanitary and other regulations, has not been granted to counties and municipalities by the constitution without limitation. That right is limited to such regulations as are not in conflict with general laws. *State* v. *Robbins*, supra., at 286.

The court invalidated the county action on the grounds that cities and counties co-equally share local police power, and that a county resolution could not operate as a "general law" capable of invalidating a contrary city ordinance.

In the case of *Foster's, Inc.* v. *Boise City*, 63 Idaho 201, 118 P.2d 721 (1941), the Idaho Supreme Court considered plaintiff's challenge to the validity of a parking meter ordinance. One of plaintiff's contentions was that the parking meter ordinance violated Article 12, Section 2, Idaho Constitution. Even though the court did not specifically refer to this constitutional provision, the court stated:

> The police power is a necessary concomitant to complete sovereignty and inheres primarily in the state. The exercise of that power, within the corporate limits of cities and villages, has been delegated to the respective municipalities. The full exercise of that power is one of the governmental duties of the respective municipalities as arms of the state, in preserving the health, safety and general welfare of the people. *Foster's, Inc.* v. *Boise City*, supra., at 211.

The city ordinance was upheld as a valid exercise of police power.

The Idaho Supreme Court upheld a validity of a city ordinance prohibiting the carrying of a concealed weapon in the case of *State* v. *Hart*, 66 Idaho 217, 157 P.2d 72 (1945). The court briefly referred to Article 12, Section 2, Idaho Constitution, and merely stated that such an ordinance was within the police power of the municipality.

The case of *Clark* v. *Alloway*, 67 Idaho 32, 170 P.2d 425 (1946) involved a malicious prosecution and false imprisonment action. The plaintiff had been

arrested pursuant to a city vagrancy ordinance, and plaintiff appealed from judgment for the defendant. One of plaintiff's contentions was that the city ordinance was invalid since there was a state law prohibiting a similar crime. The court did not discuss Article 12, Section 2, Idaho Constitution, but did rule that a city ordinance was not unconstitutional merely because it was broader in scope than the general statute and provided for different penalties.

In *State* v. *Musser*, 67 Idaho 214, 176 P.2d 199 (1946), the defendant was convicted of drinking intoxicating liquor in a public place in violation of a Boise city ordinance, even though there was a constitutional amendment ending prohibition. The court held that "Boise city possesses full police power in affairs of local concern," *State v. Musser*, supra., at 218, and further held that since Boise was a special charter city, its charter and ordinances could not be amended by general law. Referring to Article 12, Section 2, Idaho Constitution, the court stated:

> Under the above constitutional provision counties, cities and towns have full power in affairs of local government notwithstanding general laws of the state defining and punishing the same offense. *State* v. *Musser*, supra., at 219. Citing, *State* v. *Quong*, supra.; Continental Oil *Co.* v. *City of Twin Falls*, supra,; *State* v. *Robbins*, supra.; *State* v. *Hart*, supra; and *Clark* v. *Alloway*, supra.

Further, the court compared Article 12, Section 2, Idaho Constitution, to an almost identical California constitutional provision. Quoting 14 Cal.Jur. sec. 8, p. 726, the Idaho Supreme Court stated:

> This power, vested by direct grant, is as broad as that vested in the legislature itself, subject to two exceptions: it must be local to the county or municipality and must not conflict with general laws. *State* v. *Musser*, supra., at 219.

Finally, it was noted that there was no conflict between the state constitution and the city ordinance, and it was held:

> The ordinance is not repugnant to, nor in conflict with, the statutes, neither does it violate any constitutional principle, but merely a further or additional regulation enacted by the city under its police power, specifically granted to counties, cities and incorporated towns by section 2, article 12 of the Constitution. *State v. Musser*, supra., at 219.

In *State* v. *Romich*, 67 Idaho 229, 176 P.2d 204 (1946), the defendant had been convicted of selling intoxicating liquor in violation of a Boise city ordinance, even though as in *State* v. *Musser*, supra., an Idaho constitutional amendment ended prohibition. The court did not discuss Article 12, Section 2 of the Idaho Constitution expressly, but did cite *State* v. *Frederic*, supra., for the proposition that a municipal corporation possesses only such powers as the state confers upon it. Nonetheless, it was ruled that a city ordinance prohibiting the sale of intoxicating liquor was a valid exercise of police power, notwithstanding the constitutional amendment ending prohibition. Further, the court found no conflict with general law for the reason that the constitution and state statutes

relating to the sale and control of liquor still gave authority to the cities to regulate these matters. The case was remanded upon the grounds that the defendant did not receive a jury trial. In addition, the court partially invalidated the validity of the Boise city ordinance for the reason that a special legislative act to amend the Boise city charter provided for greater criminal penalties than those authorized by general law particularly Section 49-69, I.C.A., later known as Section 49-1109, I.C.A., the forerunner of Section 50-302, *Idaho Code*. The court declared the greater penalty provision void, but nonetheless remanded the case for a new trial, presumably allowing only those penalties authorized by the forerunners of Section 50-302, I.C. Accord, *State* v. *Brunello*, 67 Idaho 242, 176 P.2d 212 (1946); *State* v. *Leonard*, 67 Idaho 242, 176 P.2d 214 (1946); *State* v. *Finch*, 67 Idaho 277, 176 P.2d 214 (1946). A dissenting opinion in *State v. Romich*, supra., noted that a special charter city, such as Lewiston and Boise, was not bound by general law.

In 1947, the Idaho Supreme Court decided the case of *State* v. *White*, 67 Idaho 311, 177 P.2d 472 (1947). The defendants appealed from a conviction of allowing a vicious dog to run at-large within the city limits. The court did not discuss Article 12, Section 2, Idaho Constitution, but did look to Section 49-1109, I.C.A., the forerunner of Section 50-302, *Idaho Code*. In reaching its decision that the city ordinance was valid, the court cited *State* v. *Musser*, supra., and stated: "Boise city possesses full police power in affairs of local concern." *State* v. *White*, supra., at 473. The case was remanded upon the grounds that the defendant had not received a jury trial.

A Writ of Mandamus was sought to compel the Canyon County Board of Commissioners to issue a county license to sell beer in the case of *Barth* v. *DeCoursey*, 69 Idaho 474, 207 P.2d 1165 (1949). The suit challenged a county resolution which prohibited the sale of beer at retail outside the boundaries of a city or village. The court did not discuss Article 12, Section 2, Idaho Constitution, but merely stated:

> It is the general rule that where authority to license and regulate a business is granted by the legislature to a municipality, the regulation adopted must not be unreasonable, unjust or unduly oppressive. At 1167.

It was ruled that the Canyon County resolution was unreasonable, prohibitory and contrary to state law. In a concurring opinion, Justice Taylor noted that Article 12, Section 2, Idaho Constitution provided a direct grant of police power to counties and municipalities, which power was held co-equally by counties and municipalities.

In *Clyde Hess Distributing Co.* v. *Bonneville County*, 69 Idaho 506, 210 P.2d 798 (1949), the plaintiff challenged a county regulation prohibiting the sale of beer between more restricted hours than those allowed by state law. The court noted that both the applicable state law and county ordinance were prohibitive, the only difference being that the county ordinance was more prohibitive. Further, it was held that the legislature had not intended to occupy the whole field of liquor regulation. Citing, Am.Jur. 37, p. 790, the court said:

> Thus; where both an ordinance and a statute are prohibitory and the only difference between them is that the ordinance goes further in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot co-exist and be effective. *Clyde Hess Distributing Co.* v. *Bonneville County,* supra., at 800. Citing, *Clark* v. *Alloway,* supra., *State* v. *Musser,* supra.; and *State* v. *Brunello,* supra.

The court referred to Article 12, Section 2, Idaho Constitution, only for the proposition that a county cannot make police regulations effective within a municipality; that is, the police powers of counties and municipalities are co-equal.

In *Rowe* v. *City of Pocatello,* 70 Idaho 344, 218 P.2d 695 (1950), the plaintiff challenged a city ordinance prohibiting door-to-door solicitations. Such solicitations were declared by the ordinance to be a public nuisance. The court examined the general legislative powers conferred by Section 50-1109, I.C., the forerunner of Section 50-302, I.C., and stated:

> These are broad powers. But in this state acts of the legislature governing municipal police regulations are to be looked to as limitations upon, rather than as grants of power to the municipalities. *Rowe* v. *City of Pocatello,* supra., at 698.

In addition, the court looked at Article 12, Section 2, Idaho Constitution, and held:

> This is a direct grant of police power from the people to the municipalities of the state, subject only to the limitation that such regulation shall not conflict with the general laws. Comprehended in the term, "general laws" are other provisions of the constitution, acts of the state legislature, and, of course, the constitution and laws of the United States. Under this constitutional provision, the cities of this state are in a notably different position than are cities in jurisdictions where their police power is strictly limited to that found in charter or legislative grants. *Rowe* v. *City of Pocatello,* supra., at 698.

It was further stated by the Idaho Court that where a city's powers were not granted directly by the constitution, the municipality was limited to such powers as had been expressly granted, necessarily implied or essential to the objects and purposes of the city. Citing, *Bradbury* v. *City of Idaho Falls,* supra. The city ordinance was upheld upon the grounds that it was a valid exercise of local police regulation and was not in conflict with any general laws.

In the case of *State* v. *Poynter,* 70 Idaho 438, 220 P.2d 386 (1950), the defendant was convicted under a Pocatello ordinance of driving an automobile while under the influence of intoxicating liquor. The constitutionality of the ordinance was challenged, then the court discussed both Article 12, Section 2 of the Idaho Constitution and Section 50-1109, I.C., the forerunner of Section 50,302,

I.C. Based upon these and other provisions, the court upheld the ordinance, and said:

> The state and a municipal corporation may have concurrent jurisdiction over the same subject matter and in which event the municipality may make regulations on the subject notwithstanding the existence of state regulations thereon, provided the regulations or laws are not in conflict.
>
> The mere fact that the state has legislated on a subject does not necessarily deprive a city of the power to deal with the subject by ordinance. (Citations omitted.)
>
> A municipal corporation may exercise police power on the subjects connected with municipal concerns, which are also proper for state legislation. *State* v. *Poynter,* supra., at 388-389.

A county resolution restricting the number of issuable beer licenses in a designated area was challenged in the case of *Gartland* v. *Talbott,* 74 Idaho 125, 237 P.2d 1067 (1951). The court referred to the applicable state laws allowing cities and counties to increase and regulate beer establishments, and held:

> Also, to be considered is §2 of Art. 12, of the State Constitution, which is a direct grant of police power to the counties and municipalities of the state, subject to the limitation that such powers shall not be exercised in conflict with "the general laws." Under the provision the counties and cities of this state are not limited to police powers granted by the legislature, but may make and enforce, within their respective limits, all such police regulations as are not in conflict with the general law. Hence, the statutes are to be looked to for limitations upon the police power of the municipalities rather than as grants of such power. *Gartland* v. *Talbott,* supra., at 1069. Citing, *State* v. *Musser,* supra.; *Clyde Hess Distributing Co. v. Bonneville County,* supra.; and *Rowe v. City of Pocatello,* supra.

The court held that a limitation on a number of beer licenses which could be issued within a city or county was a legitimate police power regulation.

In *Schmidt* v. *Village of Kimberly,* 74 Idaho 62, 256 P.2d 523 (1953), the plaintiff sought a declaratory judgment on the constitutionality of the Revenue Bond Act and the validity of a village ordinance providing for the establishment and operation of a municipal water and sewage system and for the financing of the same through issuance of revenue bonds. The court upheld the validity of the acts of the city. In examining Article 12, Section 2, Idaho Constitution, the court stated:

> It is admitted that a municipality may make and enforce all reasonable rules and regulations essential and appropriate to the preservation of public health, as a valid exercise of its police power. In this state that power is given to the municipalities by the constitution itself. *Schmidt* v. *Village of Kimberly,* supra., at 523. Citing, Art. 12, §2, Idaho Constitution; and *Rowe* v. *City of Pocatello,* supra.

The establishment of an adequate sewage disposal system was found to be clearly appropriate to the promotion of public health.

The facts presented in the case of *Taggart* v. *Latah County*, 78 Idaho 100, 298 P.2d 979 (1956) were identical to those presented in the case of *Clyde Hess Distributing Co.* v. *Bonneville County*, supra. That is, the plaintiff challenged a county ordinance which established more prohibitive hours for the operation of a licensed beer establishment than were prohibited by state statute. The court stated: "Article 12, section 2 of the Idaho Constitution gives a high source of police power." *Taggart* v. *Latah County*, supra., at 982. In keeping with the *Hess* decision, the court held that the county ordinance was valid, and not unreasonable or discriminatory.

A declaratory judgment, testing the validity of a city ordinance granting a franchise to a cooperative gas association for the construction and operation of a gas distribution system within the city, was sought in the case of *O'Bryant* v. *City of Idaho Falls*, 78 Idaho 313, 303 P.2d 680 (1956). The suit challenged the authority of Idaho Falls to grant such a franchise. The court quoted 1 Dillon, Municipal Corporations, (5th Ed.) ¶237 wherein it is stated:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, — not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the court against the corporation, and the power is denied. *O'Bryant* v. *City of Idaho Falls*, supra., at 682-683.

Based upon the foregoing, the court held that neither the constitution nor the statutes of Idaho expressly granted to cities the right to construct, operate and maintain a gas distribution system. It should also be noted that *O'Bryant* appears to be the only Idaho case in which the Idaho Supreme Court directly addressed itself to a consideration of "home rule," even though Article 12, Section 2 of the Idaho Constitution was not discussed. The court stated:

> *We are not concerned with the merits or demerits of so-called "home rule" by municipalities* whereby the law would empower a municipality to construct, operate and maintain its own system of distribution of gas as compared with a system for distribution of gas constructed, maintained and operated by a public utility holding a certificate of convenience and necessity. *Such question is strictly a matter of policy for the people or the legislature and is not for consideration by the court.* This court is only concerned with statutes as it finds them and the application of same to the facts before the court. *O'Bryant* v. *City of Idaho Falls*, supra., at 687. (Emphasis added.)

From this, perhaps it can be said that the Idaho Supreme Court will refuse to declare Idaho a constitutional home rule state regarding any matters of local concern without clarification of existing law by the legislature, or without clarification by the people through adoption of a constitutional amendment.

In the case of *Oregon Short Line Railroad Co.* v. *Village of Chubbuck*, 83 Idaho 62, 357 P.2d 1101 (1960), the plaintiff brought an action to void an ordinance which attempted to annex railroad land. The court did not discuss Article 12, Section 2, Idaho Constitution, but did rule:

> Municipal corporations can exercise only such powers as are expressly granted or necessarily implied from the powers granted; doubt as to the existence of powers, must be resolved in favor of the granting power. *Oregon Short Line Railroad Co.* v. *Village of Chubbuck*, supra., at 1103. Citing, *State* v. *Frederic*, supra.; *Continental Oil Co.* v. *City of Twin Falls*, supra.; and *O'Bryant* v. *City of Idaho Falls*, supra.

The court held the attempted annexation invalid upon the grounds that cities have the power to annex additional territory only under the conditions, restrictions and limitations imposed by the legislature.

In *State* v. *Clark*, 88 Idaho 365, 399 P.2d 955 (1966), the defendant was convicted of violating a county subdivision ordinance. On appeal, the defendant alleged that the county did not have authority to adopt a subdivision ordinance. In interpreting Article 12, Section 2, Idaho Constitution, the court quoted both *State* v. *Musser*, supra., and *Gartland* v. *Talbott*, supra. (Both of these quotes are hereinabove quoted in this summary.) The court also compared the Idaho constitutional provision with Article XI, Section 11 of the California Constitution, a similar provision, and quoted *Pasadena School District* v. *City of Pasadena*, 166 Cal. 7, 134 P. 985, 47 L.R.A., N.S. 892 (1913). Therein the California Court stated that this constitutional provision conferred power upon every county, city and town to make and enforce within its limits all local police, sanitary, and other regulations which were not in conflict with the general laws, subject only to the limitation that such regulations must not conflict with the general laws enacted by the legislature on the subject. The Idaho Court then stated:

> From a review of the cases construing such constitutional provision it may be said that there are three general restrictions which apply to legislation under the authority conferred by such provision: (1) The ordinance or regulation must be confined to the limits of the governmental body enacting the same, (2) It must not be in conflict with other general laws of the state, and (3) It must not be unreasonable or arbitrary enactment: *State* v. *Clark*, supra., at 960.

The subdivision ordinance was upheld as a valid exercise of local police power.

A citizens group brought a declaratory judgment seeking to declare the county zoning ordinance void in *Citizens for Better Government* v. *County of Valley*, 95 Idaho 320, 508 P.2d 550 (1973). Valley County had adopted a zoning ordinance without following proper procedures for adoption of zoning ordinances as required by I.C. 50-1204. In discussing Article 12, Section 2, Idaho Constitution, the court stated:

> Idaho Const. art. 12, §2, authorizes a county *to make* police regulations not in conflict with the general laws. Although the appellant restricts

> the definition of a "general law" to laws defining the scope and nature of matters subject to regulation, the definition of "general law" under Idaho Const. Art. 12, §2, is not so narrowly limited. The authority "to make" regulations comprehends not only the nature and scope of the subject matter of the regulation in relation to the general laws, but also the method and manner of its adoption. The authority "to make" police regulations as used in the constitution includes the psocedure for their adoption, which must not be in conflict with the general laws. A general law may confer direct authority to act as well as supply procedural requirements for the adoption of police regulations under Art. 12, §2. *Citizens for Better Government* v. *County of Valley*, supra., at 551.

The zoning ordinance was declared void by the court for failure of the county to comply with the statutory requirements for a public hearing following published notice.

In the case of *County of Ada* v. *Walker*, 96 Idaho 630, 533 P.2d 1199 (1975), Ada County sued the defendant for violation of a zoning ordinance prohibiting the maintenance of mobile home parks in specified areas. The court merely referred to Article 12, Section 2 of the Idaho Constitution for the proposition that this constitutional provision granted authority for adoption of zoning ordinances by a city or county, and held that zoning ordinances constitute a valid exercise of local police power.